Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD E. ARMSTRONG, POST-BANKRUPTCY PETITION AND AS A BENEFICIARY OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST, *Petitioner*

v.

ROGER G. SEGAL, AS TRUSTEE OF THE MOUNTAIN PACIFIC VENTURES, INC. et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

DONALD E. ARMSTRONG, PRO SE
INDIVIDUALLY, POST-BANKRUPTCY PETITION AND AS BENEFICIARY OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald E. Armstrong, individually and post-bankruptcy-petition and as a beneficiary of the Donald E. Armstrong Family Trust ("Family Trust") and the Donald E. Armstrong Charitable Remainder Unitrust ("Charitable Trust") (collectively the "Trusts") ("Armstrong") respectfully petitions for a writ of certiorari to review one decision of the Tenth Circuit Court of Appeals.

QUESTIONS PRESENTED

1. Can a permanent injunction be moot preventing appellate review and be an unconstitutional denial of a party's access to the courts?

2. Can a bankruptcy court enjoin non-parties to a settlement—especially that have not been noticed of the bankruptcy proceedings and where the estate was fully liquidated?

3. Are interlocutory orders in dismissed cases based on F.R.C.P. 41(a) entitled to preclusive effect?

4. Can penalties of over $2.8M in relation to zero actual damages against non-debtors provide standing to an alleged creditor and are these penalties unconstitutionally excessive? Can any exemplary damages be awarded without an award of actual damages?

5. Can a bankruptcy plan of reorganization be approved based on paying all unsecured creditors when one unsecured creditor has not been paid and that creditor was denied the right to a hearing?

PARTIES TO THE PROCEEDINGS

Roger G. Segal as Trustee of the Chapter 11 Bankruptcy Estate of Mountain Pacific Ventures, Inc.

Kenneth A. Rushton as Trustee of the Chapter 11 Bankruptcy Estate of Donald E. Armstrong

Steppes Apartments, Ltd.

John L. and Rosalie Feece

Donald E. Armstrong as Trustee of the Donald E. Armstrong Family Trust and Donald E. Armstrong Charitable Remainder Unitrust

Donald E. Armstrong, Post Bankruptcy Petition And As Beneficiary of the Donald E. Armstrong Family Trust and the Donald E. Armstrong Charitable Remainder Unitrust

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT 2

BACKGROUND 5

REASONS FOR GRANTING THE PETITION 7

ISSUES PRESENTED 9

1. Can A Permanent Injunction Be Moot Preventing Appellate Review And Be An Unconstitutional Denial Of A Party's Access To The Courts? 9
2. Can A Bankruptcy Court Enjoin Non-Parties To a Settlement—Especially That Have Not Been Noticed Of The Bankruptcy Proceedings And Where The Estate Was Fully Liquidated? 12
3. Are Interlocutory Orders In Dismissed Cases Based On F.R.C.P. 41(A) Entitled To Preclusive Effect? 17
4. Can Penalties Of Over $2.8m In Relation To Zero Actual Damages Against Non-Debtors Provide Standing To An Alleged Creditor And Are These

Penalties Unconstitu-tionally Excessive? Can Any Exemplary Damages Be Awarded Without An Award Of Actual Damages? 18

5. Can A Bankruptcy Plan Of Reorganization Be Approved Based On Paying All Unsecured Creditors When One Unsecured Creditor Has Not Been Paid And That Creditor Was Denied The Right To A Hearing? 23

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Apache Corp. v. Moore, 517 U.S. 1217 (1996)..... 2

Armstrong v. Manzo, 380 U.S. 545 (1965) 2, 6, 14, 26

Armstrong v. Steppes Apartments, Ltd. 57 S.W.3d 37, 40 Fn. 1 (Tex.App.-Fort Worth,2001)..... 19

BMW of North America, Inc. v. Gore, 517 U.S. 559, 568, (1996) 2, 8, 19, 26

Browning-Ferris Industries of Vermont, Inc. v. Kelco, 109 S.Ct. 2909, 2926 (1989) 20

Celotex Corp. v. Edwards, 514 U.S. 300, 307 (1995)..... 10

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 2, 8, 18, 21

Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2455 (1990) 17

E.E.O.C. v. HBE Corp. 135 F.3d 543, 557 (C.A.8 1998) ... 20

Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2648 (U.S.,2004)..... 30

Hansberry v. Lee, 311 U.S. 32, 40 (1940)..... 2, 14

Huntington v. Attrill, 146 U.S. 657, 664 (1892)..... 22

In re A.H. Robins Co. Inc., 880 F.2d 694 (4th Cir. 1989)... 14

In re AAPC, Inc., 277 B.R. 785, (Bankr.D.Utah 2002)..... 11

In re Beyond.com Corp., 289 B.R. 138, 146 (Bkrtcy.N.D.Cal.,2003) 25

In re Continental Airlines, 203 F.3d 203 (3rd Cir. 2000) ... 14

In re Dow Corning Corp., 280 F.3d 648, (C.A.6 2002)..... ..... 3, 7, 14, 15

In re Drexel Burnham Lambert Group Inc., 960 F.2d 285 (2nd Cir. 1992) 14

In re Hexcel Corp., 239 B.R. 564, 567 (N.D.Cal.1999)..... 14

In re Lacy, 183 B.R. 890, 895, (Bankr.D.Colo. 1995) 11

In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995) 14

In re Savage Industries, Inc., 43 F.3d 714, 720 (1st Cir.1994) 14

In re Specialty Equipment Co. Inc., 3 F.3d 1043 (7th Cir. 1993)..... 14

In re Western Real Estate Fund Inc., 922 F.2d 592, 601 (10th Cir. 1990)..... 8, 11, 14, 16

In re Zale Corp., 62 F.3d 746 (5th Cir. 1995)..... 14

Matter of FedPak Systems, Inc., 80 F.3d 207, 215 (C.A.7 1996)..... 10

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) 2, 6, 14, 15, 26

Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) 13

Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir.1984) .. 10

Peralta v. Heights Medical Center, Inc., 485 U.S. 80 (1988) 2, 6, 26

Sierra Club Foundation v. Graham, 85 Cal.Rptr.2d 726, 743 (Cal.App. 1 Dist.,1999) 21

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S.Ct. 1513, (U.S.,2003) 2, 8, 19, 21, 25, 26

Steves Sash & Door Co. v. Ceco Corp., 751 S.W.2d 473 (Tex. 1988) 22

Testa v. Katt, 67 S.Ct. 810, 812 (1947 23

Tripp v. Prock, 865 F.2d 265, 3 (Table) (C.A.9 1988)..... 25

United States v. Bajakajian, 524 U.S. 321 (1998) 2, 8, 21

Winchester Homes, Inc. v. Osmose Wood Preserving, Inc., 37 F.3d 1053, 1058 (C.A.4,1994)..... 18

Statutes

11 U.S.C. § 524(e)..... 13

11 U.S.C. § 704 2

11 U.S.C. § 1106 2

11 U.S.C. § 1129(a)(7)(A)(ii)..... 24, 28

11 U.S.C. § 1129(b) 24

28 U.S.C. § 1254(1) 1

Tex. Civ. Prac. & Rem. Code § 41.004(a) 20

Tex. Fin. Code. Ann. § 305.001 20

Other Authorities

Effect of Nonsuit, Dismissal, or Discontinuance of Action on Previous Orders, 11 A.L.R.2d 1407, § 3, 6 18

Rules

F.B.R.P. 4007 12

Constitutional Provisions

U.S.C.A. Const. Amend. I 1, 3, 7, 13

U.S.C.A. Const. Amend. V 1, 6

U.S.C.A. Const. Amend. VIII 1

U.S.C.A. Const. Amend. XIV 2, 6

OPINIONS

The Tenth Circuit Court of Appeals decision affirming the dismissal entered on May 27, 2004 in 03-4005. (not reported) (Order is reproduced as App. A. All future reproduced documents shall be referred to as "App. Letter".) The Utah District Court order dismissing Case 2:02CV00567 entered on December 12, 2002. (App. B) The Utah Bankruptcy Court order approving the Plan of Reorganization entered on May 3, 2002. (App. C)

JURISDICTION

The date on which the United States Court of Appeals decided my case in 03-4005 was May 27, 2004. No petition for rehearing was filed in the case. An extension of time to file the petition for a writ of certiorari was granted to and including October 9, 2004 on August 23, 2004 in Application No. 04A159.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Constitutional Amendment provides in relevant part: "Congress shall make no law .....to petition the Government for a redress of grievances." *U.S.C.A. Const. Amend. I* (App. D § 1)

The Fifth Constitutional Amendment provides in relevant part: "No person shall be ..... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *U.S.C.A. Const. Amend. V* (App. D § 2)

The Eighth Constitutional Amendment provides in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *U.S.C.A. Const. Amend. VIII* (App. D § 3)

The Fourteenth Constitutional Amendment

provides in relevant part: "No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U.S.C.A. Const. Amend. XIV* (App. D § 4)

STATEMENT

This case is essentially about the Utah federal courts denying Armstrong and/or the Trusts the right to be heard. Most, or all, of these issues are grounded in this concept. The Mountain Pacific Ventures, Inc. ("MPV") Plan of Reorganization ("Plan") is directed at enjoining Armstrong and the Trusts' rights to be heard. There was no need for the MPV Plan since Segal had the funds to pay all valid unsecured creditors in full early in the case. Instead, Segal delayed payment of the unsecured creditors and spent hundreds of thousands of dollars in legal fees to obtain approval of the Plan creating risk to the valid unsecured creditors. This is not consistent with a bankruptcy trustee's duties to the estate, creditors and the debtor. 11 U.S.C. §§ 704 and § 1106 (App. D §§ 5 and 6)

This Court has consistently upheld the basic due process issues of jurisdiction, notice and a full and fair opportunity to be heard before an unbiased and impartial tribunal. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) ("*Mullane*"); and *Hansberry v. Lee,* 311 U.S. 32, 40 (1940) ("*Lee*"); *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 568, (1996) ("*BMW*"); *State Farm Mut. Auto. Ins. Co. v. Campbell,* 123 S.Ct. 1513, (U.S.,2003) ("*State Farm*"); *United States v. Bajakajian,* 524 U.S. 321 (1998) ("*Bajakajian*"); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001) ("*Cooper*"); *Apache Corp. v. Moore,* 517 U.S. 1217 (1996) ("Apache"); *Armstrong v. Manzo,* 380 U.S. 545 (1965) ("*Manzo*"); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988) ("*Peralta*").

The Utah Bankruptcy Court and the Tenth Circuit Court of Appeals entered and affirmed a litigation injunction ("Injunction") against Armstrong that completely denies Armstrong the constitutional right to access to the courts. *U.S.C.A. Const. Amend. I* This injunction prevents Armstrong and numerous other parties from filing any pleadings relating to numerous individuals, most of which have absolutely no relationship to the MPV Bankruptcy. Under the facts of these cases, Armstrong is completely denied access to the courts. The Tenth Circuit held that Armstrong's appeal of the MPV Confirmation Order ("Confirmation") was moot because the MPV Bankruptcy Estate was fully resolved. However, the litigation injunction is a permanent injunction affecting Armstrong and others forever.

The Confirmation and the Injunction affect numerous parties that had no standing, that were not noticed and where the Bankruptcy Court had no jurisdiction. The various circuit courts have entered differing rulings on the issue of exactly who a bankruptcy court can enjoin and/or who they can release. It is time for this Court to resolve the question of what authority and jurisdiction a bankruptcy court has in relation to injunctions and especially permanent injunctions.

Various courts have upheld injunctions in bankruptcy cases to protect ongoing entities in chapter 11 reorganizations. *In re Dow Corning Corp.*, 280 F.3d 648, (C.A.6 2002) ("*Corning 1*") (petition denied at 537 U.S. 816, 2002) There are split decisions among the circuits on permanent injunctions in bankruptcy estates.

Steppes Apartments, Ltd. ("Steppes") plays a major role in this horror. Steppes obtained a Modified Judgment in excess of $2.8M in Texas usury forfeitures and penalties in relation to zero actual damages against the Trusts on May 8, 1997. (App. E) The Modified Judgment specifically excludes liability against Armstrong. Steppes

filed an action in Utah in 1997 claiming fraudulent transfers and filed lis pendens on 10 Utah properties. Steppes' filed a proof of claim in the MPV Bankruptcy based on the Modified Judgment and alleged fraudulent transfers. Only one of the affected properties was ever owned by the Trusts and this one property was not owned by MPV. Judge Clark ruled that Steppes' lis pendens were wrongful liens on September 7, 2001. (App. F) Armstrong and the MPV Trustee, Roger Segal ("Segal") argued the the penalties in the Modified Judgment are unconstitutionally excessive, not entitled to full faith and credit in Utah and that no penalties could be awarded without an award for actual damages. Steppes had no standing in the MPV Bankruptcy since the penalties were unconstitutionally excessive.

Steppes, Segal and the Bankruptcy Court relied on interlocutory orders in cases Steppes dismissed with prejudice based on F.R.C.P. 41(a). In Steppes' Memorandum in Support of Motion to Clarify and/or Reconsider Order Modifying Plan of Reorganization, Background ¶5, Steppes states: "Subsequent to the entry of the Litigation Injunction, the parties took action to substantially consummate the Plan of Reorganization, including the disbursement of money and the dismissal of several lawsuits *with prejudice*." The Bankruptcy Court gave preclusive effect to these interlocutory orders. Res judicata requires final and appealable orders. Courts are now eroding that concept to give effect to interlocutory orders that were not appealable denying a party the right to appellate review.

Segal's plan of reorganization was based on paying all unsecured creditors in full so that the unsecured class could not vote on the plan. Armstrong acquired several claims post-bankruptcy petition. One of those claims was not paid at all and Armstrong was denied the right to a hearing. The Bankruptcy Court held that Segal's objection

to Armstrong's claim did not provide Armstrong with the statutory 30 days and yet Segal did not pay Armstrong's claim.

BACKGROUND

All this litigation stems from a case originating in Texas. Steppes purchased the Steppes Apartments from the Trusts on September 29, 1994 executing notes and deeds of trust in favor of the Trusts for 90% of the purchase price along with a personal guaranty from John L. Feece ("Feece") in favor of the Trusts. (App. E)

The Modified Judgment was entered on May 8, 1997 that specifically excludes liability against Armstrong, individually. The Modified Judgment contains zero actual damages, but awards over $2.8M in exemplary damages. Steppes filed an action in Utah Federal District Court as Case No. 2:97-CV-0663ST (the "Fraudulent Transfer Action") against the Family Trust Armstrong, individually, and MPV asserting the same claims Steppes and Feece litigated and/or could have litigated in Texas. This is the very first time that Armstrong, individually, or MPV were ever named.

Steppes filed lis pendens' on all property Armstrong, or any entity Armstrong had any interest in including MPV, with the specific provision that the lis pendens' also affected any property Armstrong, the Family Trust or MPV could acquire in the future. These lis pendens caused Willow Brook Cottages, L.L.C., MPV and Armstrong, individually, to declare bankruptcy. MPV filed for protection under Chapter 11 in Case 99-22588 ("22588"). Armstrong filed for protection under Chapter 11 of the Bankruptcy Code on March 10, 2000 in what became Utah Bankruptcy Case 00-26592 ("26592").

Steppes filed a proof of claim in 22588 based on the Fraudulent Transfer Action. MPV filed an adversary proceeding against Steppes as an objection to Steppes'

claim and for affirmative relief for Steppes' filing of wrongful liens.

On September 7, 2001, the Honorable Glen E. Clark ruled that Steppes May 6, 1998 lis pendens' were wrongful liens under the Utah Wrongful Lien Act. (App. F and G) Despite Judge Clark's September 7, 2001 Order, Steppes and Feece still refused to release their May 6, 1998 wrongful liens and Armstrong still cannot obtain a hearing on Armstrong's post-bankruptcy-petition property rights.

Steppes' May 6, 1998 wrongful liens affected MPV and Armstrong post-bankruptcy-petition and as a Beneficiary of the Trusts, outside of the Armstrong Bankruptcy Estate, and deny Armstrong, in all capacities, his Fifth and Fourteenth Amendment property rights. *U.S.C.A. Const. Amend. V and XIV* (App. D §§ 2 & 4)

The Beneficiaries of the Trusts, including Armstrong as a Beneficiary, have never been provided notice of any kind or given any opportunity to defend themselves as to any of these claims and actions by Steppes. *Mullane*, *Manzo* and *Peralta* Numerous Utah federal judges, Utah and California bankruptcy judges, the Tenth Circuit Court of Appeals and Utah State Court judges refuse to provide Armstrong the right to discovery, due process or any hearing on the merits. These issues have never been addressed on the merits and there is no final judgment on these issues. Most of these issues warrant a *de novo* review which has never occurred.

Armstrong has lost his reputation, business, financial stability, assets, home, credit rating, career, freedom, right to own property and many other constitutionally protected rights as a result of the various courts denying Armstrong his right to a hearing.

Segal proposed a plan of reorganization that liquidated all of MPV's assets. There was no ongoing business. Segal's plan contained the Injunction that is permanent and ongoing. There is no purpose to a permanent injunction since MPV was fully liquidated. The Tenth Circuit held that Armstrong's appeal was moot because the plan was fully consummated illustrating that there is no purpose or need for the ongoing Injunction. It cannot be that the case is moot because the estate is fully consummated and that there is any purpose to a permanent injunction. The purpose of broad reaching injunctions is to facilitate the reorganization of a debtor. With no ongoing reorganized debtor there is no basis, statute, authority or jurisdiction to maintain a permanent injunction.

REASONS FOR GRANTING THE PETITION

This Court has continually protected the constitutional right to access to the courts. *U.S.C.A. Const. Amend. I* The Tenth Circuit refused to consider Armstrong's appeal claiming it was moot since the MPV plan was allegedly fully consummated. The MPV plan contains the Injunction affecting Armstrong and others permanently. Bankruptcy courts have limited jurisdiction. There are numerous decisions in the circuit courts addressing the limits of bankruptcy court jurisdiction to impose sanctions on non-parties and protecting non-parties. The most a court has approved are injunctions to protect the reorganization of an ongoing enterprise. *Corning 1* In the Corning cases there was an ongoing enterprise and ongoing claims that were affected. The court held that injunctions may be appropriate to protect reorganizations under certain situations. In the present case there is no ongoing enterprise and no purpose for permanent injunctions. It is important for this Court to explain the exact limits of bankruptcy court jurisdiction, whether permanent

injunctions are moot and cannot be appealed and whether bankruptcy courts can enjoin anyone to protect persons or entities that are liquidated. The Tenth Circuit held that § 105(a) does not override § 524(e) and that bankruptcy courts can't release non-debtors. *In re Western Real Estate Fund Inc.*, 922 F.2d 592, 601 (10th Cir. 1990) ("*Western*")

There is an unanswered question relating to the preclusive affect of interlocutory orders in cases that are dismissed according to F.R.C.P. 41(a)(1). The Tenth Circuit and other courts continually rely on interlocutory orders in the Fraudulent Transfer case that Steppes voluntarily dismissed based on F.R.C.P. 41(a)(1). (App. D § 7) Steppes also dismissed other cases based on the same claims implicating the dismissal with prejudice portion of F.R.C.P. 41(a)(1). Several courts are now giving preclusive effect to interlocutory orders that are not final and appealable. It is important for the Court to finally resolve this question especially in relation to dismissals based on F.R.C.P. 41(a)(1).

This Court has delivered several opinions relating to the unconstitutionality of excessive punitive damage and penal judgments in recent years. *BMW, State Farm, Bajakajian* and *Cooper* This Court has not specifically addressed these principles in relation to statutory civil penalties. It is necessary for this Court to confirm that the principles laid out in these cases apply to all penalties of all kinds and not just punitive damages. There are references in *BMW* and *State Farm* that these principles apply to all penalties awarded by states but there have been no cases with these facts.

This Court has continually applied the *BMW* guideposts that include a ratio evaluation of penalties to actual damages or harm caused. In Texas, there is a statute that provides that no exemplary damages can be awarded without an award of actual damages. Tex. Civ.

Prac. & Rem. Code § 41.004(a) (App. D § 8) The Texas courts refused to honor their own statute. It would save a great deal of litigation for this Court to state that there can, or cannot, be exemplary damages without an award of compensatory or actual damages. This entire mass of litigation would have been avoided since Steppes was never awarded any actual damages and, in fact, Steppes did not claim any actual damages in Texas. It is critical that this Court confirm that there can be no statutory penalties, civil penalties or punitive damages without an award of actual damages. The Court could address this issue at the petition level by simply applying *BMW*, *State Farm, Cooper* and *Bajakajian* to civil and statutory penalties and confirming that there can be no exemplary damages without an award of actual damages.

The Bankruptcy Code provides that a class of claims may vote on a plan of reorganization unless all of the class has been paid. Armstrong owned a claim that had not been determined to be denied and where Segal never held a valid hearing to determine the validity of Armstrong's claim. The Bankruptcy Court approved the plan of reorganization based on paying all unsecured creditors when all unsecured creditors were not paid. It is critical that this Court address this issue and vacate the MPV plan of reorganization.

ISSUES PRESENTED

1. **Can A Permanent Injunction Be Moot Preventing Appellate Review And Be An Unconstitutional Denial Of A Party's Access To The Courts?**

The MPV Plan contains the Injunction that prevents Armstrong and other parties from pursuing actions against the MPV estate, Segal and numerous other parties including Steppes. The Tenth Circuit held that the MPV plan was consummated and that

Armstrong's appeal was therefore moot preventing review of Armstrong's appeal.

The Injunction is permanent having prospective effect. Segal and Steppes continue to benefit by the Injunction and yet the Tenth Circuit refuses to consider the merits of Armstrong's appeal. This Court has defined the concept of mootness in relation to civil cases[1].

Clearly, relief can be provided here in removing or modifying the Injunction. Armstrong's appeal is not moot. What really occurred here is that the courts used the issue of mootness to deny Armstrong the constitutional right to be heard. The same injunctions were entered in 22588 and 26592. On September 3, 2004, Judge Cornish modified the injunction entered in 26592 continuing its enforcement and adding additional limitations. (App. H)

Bankruptcy courts are courts of limited jurisdiction. "The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995) The principal test for bankruptcy jurisdiction is whether the action can have an effect on the bankruptcy estate. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir.1984) Bankruptcy courts and/or parties cannot create their own jurisdiction. *Matter of FedPak Systems, Inc.*, 80 F.3d 207, 215 (C.A.7 1996);

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[1] [A] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). The underlying concern is that, when the challenged conduct ceases such that " 'there is no reasonable expectation that the wrong will be repeated,' *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895))

In re AAPC, Inc., 277 B.R. 785, (Bankr.D.Utah 2002) (App. C) However, in MPV, Judge Clark entered an order that specifically affected the Trusts and the Beneficiaries without notice and a full and fair opportunity to be heard. Judge Clark exceeded his jurisdiction in order to enjoin Armstrong, the Trusts and others. It is critical that this Court grant this petition to address the limits of bankruptcy court jurisdiction especially in relation to parties that were never noticed.

The Injunction protects numerous parties that did not contribute to the MPV estate or have anything to do with the MPV estate. The Tenth Circuit held that the MPV Plan was consummated. Clearly, no litigation between Armstrong, the Trusts or the Beneficiaries against Steppes, Feece or the other protected parties will have any effect on the MPV estate. All unsecured creditors (except Armstrong) were paid in full. The only possible affect is the complications that Segal and the Bankruptcy Court created without jurisdiction or legal authority. *In re Lacy*, 183 B.R. 890, 895, (Bankr.D.Colo. 1995) (citing *Matter of Holly's, Inc.*, 172 B.R. 545 (Bankr.W.D.Mich. 1994)) and *Western* It is critical that this Court address who bankruptcy courts have jurisdiction over to protect or enjoin.

This issue is simple, if the Injunction continues in effect Armstrong's appeal is not moot. If Armstrong's appeal is moot there can be no continuing effect of the Injunction. It is critical that this Court define mootness in relation to permanent injunctions and bankruptcy courts. Absent consideration and reversal by this Court, lower courts will use the Tenth Circuit decision as a means of denying other parties' right to be heard on permanent injunctions by claiming the issues are moot while allowing the permanent injunction to remain effective.

Armstrong is entitled to appellate review especially of the Injunction. The issue of bankruptcy court jurisdiction and authority to enjoin parties is ripe for this Court's consideration and determination. Certainly a permanent injunction is never moot. Neither 11 U.S.C. §§ 105 nor 524(e) (C §§ 9 and 10) allow for enjoining debtors and releasing non-debtors, non-creditors and non-parties.

2. CAN A BANKRUPTCY COURT ENJOIN NON-PARTIES TO A SETTLEMENT—ESPECIALLY THAT HAVE NOT BEEN NOTICED OF THE BANKRUPTCY PROCEEDINGS AND WHERE THE ESTATE WAS FULLY LIQUIDATED?

The Settlement is between Steppes, Segal and Rushton yet it affects Armstrong, the Trusts and the Beneficiaries. Armstrong, the Trusts and the Beneficiaries never participated in the Settlement nor agreed to it. Steppes, Segal and Rushton essentially entered into a unilateral agreement specifically to address the rights of other parties in a horribly negative manner. (App. I) This is unconstitutional.

The Settlement contains numerous provisions including: 1) that Armstrong et al. are enjoined from pursuing any claim or defense; 2) that Steppes can refile Steppes nondischargeability complaint against Armstrong forever regardless of the time limits in F.B.R.P. 4007 (App. D § 11); and 3) that the Modified Judgment remains effective. (App. I ¶¶9, 10, 12, & 13)

A bankruptcy plan or order approving a settlement cannot create rights inconsistent with the law or the Code. This Settlement does just that. A nondischargeability complaint must be filed in a timely manner. F.B.R.P. 4007 A settlement cannot circumvent this rule. The Settlement allows Steppes to refile a nondischargeability complaint forever regardless of F.R.B.P. 4007. (App. D § 11) The Settlement protects

Steppes in all ways AND yet allows Steppes to continue to pursue the Modified Judgment including against Armstrong. Steppes did not "settle" anything. Steppes gave up nothing, retained everything they wanted and obtained an injunction preventing the Trusts and Armstrong from even defending themselves. Armstrong has never located any case where a party is denied the right to defend themselves. The issues between Steppes and the Trusts have nothing to do with MPV. The issues between Steppes and Armstrong have nothing to do with MPV. The Code does not provide authority or jurisdiction for the Bankruptcy court to enjoin issues and/or parties that have nothing to do with the bankruptcy estate. Steppes could not have obtained this relief through litigation and the Code. The Code does not allow Bankruptcy courts to approve settlements that provide parties relief outside the Code.

This is not a settlement but an illegal use of the bankruptcy court to destroy Armstrong and the Trusts while denying Armstrong and the Trusts the constitutional right to access to the courts. *U.S.C.A. Const. Amend. I*

The related issues here are: 1) Does a bankruptcy court have authority under 11 U.S.C. § 105 to enjoin non-debtors despite 11 U.S.C. § 524's ("524") specific limitations on injunctions? 2) Can a bankruptcy court enter permanent injunctions in a liquidation case and/or once the estate conducts no more business?

Section 524 specifically provides that only actions against a debtor can be enjoined. 11 U.S.C. § 524(e) Section 105(a) provides broad powers to bankruptcy courts to enter orders. As a general rule, the equitable powers of § 105(a) cannot be used by court to authorize more extensive relief than a specific provision of the Code. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) There is a serious dispute

between the circuits. The Second, Third, Fourth, Sixth and Seventh Circuits support broad-based injunctions. *Corning 1*; *In re Continental Airlines*, 203 F.3d 203 (3rd Cir. 2000); *In re Specialty Equipment Co. Inc.*, 3 F.3d 1043 (7th Cir. 1993); *In re Drexel Burnham Lambert Group Inc.*, 960 F.2d 285 (2nd Cir. 1992); *In re A.H. Robins Co. Inc.*, 880 F.2d 694 (4th Cir. 1989) The Ninth and Tenth Circuits hold that § 105(a) does not override § 524(e). *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995) *(petition denied* 517 U.S. 1243 (1996)); *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995); *In re Western Real Estate Fund Inc.*, 922 F.2d 592 (10th Cir. 1990)

In this case, the Tenth Circuit ignored its own rulings in avoiding the merits. This is significant in that, once again, courts will go to any length to avoid Armstrong's claims and rights.

In this situation, the injunction is against the debtor Armstrong and other parties that are not parties in interest, have never been noticed and where the bankruptcy court has no jurisdiction. "Notice, after all, is the cornerstone underpinning bankruptcy procedure." *In re Savage Industries, Inc.*, 43 F.3d 714, 720 (1st Cir.1994); *In re Hexcel Corp.*, 239 B.R. 564, 567 (N.D.Cal.1999). Segal never noticed the Trusts or the Beneficiaries of the Trusts and yet the courts have held the Trusts and the Beneficiaries bound by the Settlement. This is clearly unconstitutional. *Mullane, Lee* and *Manzo* (App. G) Clearly, Segal knew how to notice the Trusts and the Beneficiaries yet Segal chose not to. This Court already held that beneficiaries that are known must be noticed. *Mullane* The lower courts all ignored *Mullane* and entered injunctions against parties that were never noticed. (App. C at 12a, 14a-17a) Additionally, the Injunction specifically benefits a long list of parties that have no interest in the MPV estate or have ever contributed to the MPV estate. In fact, most of the

parties protected by the Injunction caused the MPV bankruptcy and now want the bankruptcy court to protect them for what they have done. This is clearly not the purpose of §§ 105 or 524.

The Sixth Circuit established tests to evaluate whether injunctions are appropriate stating they are only appropriate in "unusual circumstances". *Corning 1* at 658 There is no room to provide a detailed analysis of these tests here. Suffice it to say that the protected parties did not contribute anything to the MPV reorganization; there was no MPV reorganization; the parties enjoined were not parties, not noticed and were not aligned with the debtor or creditors; the Injunction has nothing to do with the MPV reorganization; the Injunction has no effect on the creditors or the debtor; and Armstrong was denied the right to be paid for all of Armstrong's claims.

Under §§ 105(a) and or 524, the bankruptcy court has no jurisdiction to enter injunctions that protect parties completely unrelated to the case or to enjoin non-parties that have no claim against the estate. Armstrong suggests that this issue is so basic and fundamental that it warrants this Court's consideration. Armstrong cannot find many cases where courts enforced settlements against non-parties where there was no jurisdiction or notice. *Mullane* It is up to this Court to address this issue and confirm the exact limits of bankruptcy court jurisdiction, especially in relation to injunctions and especially when there is no relation to the bankruptcy case, on non-party rights affected by settlements in which they did not participate or consent—including in a bankruptcy proceeding.

There is a significant division between the circuits relating to whether the general statute § 105(a) takes precedence over the specific statute § 524(e). The general rule is that a specific statute supersedes a general

statute. *Western* at 601 Section 524(e) is very specific that non-debtors cannot be released. Congress amended Section 524 in 1994 adding subsection g providing for one specific example where a bankruptcy court does have authority to release non-debtors. This specific amendment illustrates that Congress did not create any other exceptions to Section 524(e). Bankruptcy courts are using Section 105(a) to override other clear sections of the Code. Based on this reasoning, bankruptcy courts can use Section 105(a) to do whatever they want regardless of the Code. Essentially, as in this situation, bankruptcy courts are now ignoring the Code to do whatever they want. There is no basis in the Code to enter a permanent injunction that extends after the estate is closed to enjoin a debtor and protect non-parties. In all the cases where circuit courts have allowed injunctions it was to protect parties directly related to and liable for, the debtor and that contributed financially to the reorganization. In this situation the parties released in the Plan have no relationship to the debtor, did nothing to contribute to the Plan and, in fact, caused the MPV bankruptcy by filing lis pendens that Judge Clark called a pre-judgment writ of attachment without the protections of due process. (App. G) The real purpose of the Injunction is to protect Steppes and related parties from claims for filing the wrongful liens and wrongful bankruptcy claims based on unconstitutionally excessive penalties. (App. E)

Why is a bankruptcy court protecting creditors that caused the bankruptcy to be filed by filing wrongful liens against the debtor? Why is a bankruptcy court enjoining the debtor and other non-parties without notice and due process in violation of the Bankruptcy Code. 11 U.S.C. § 524(e)? Why is a bankruptcy court protecting this creditor when there is no relationship to the estate or any possibility of any valid unsecured creditor being paid

one penny? It is necessary for this Court to answer these questions and tell the courts that bankruptcy courts do not have jurisdiction or authority to enjoin debtors and non parties and release nondebtors and creditors using Section 105(a) to ignore the Bankruptcy Code entirely for the benefit of creditors that cause bankruptcies.

It is time for this Court to address these issues and resolve these differences between the circuits. Clearly there is a major dispute between some courts using Section 105(a) to completely ignore Congress' intent in Section 524(e).

3. Are Interlocutory Orders In Dismissed Cases Based On F.R.C.P. 41(A) Entitled To Preclusive Effect?

Various interlocutory orders were entered in the Fraudulent Transfer Case that Steppes voluntarily dismissed based on F.R.C.P. 41(a)(1) and Steppes dismissed other cases raising the same claims. Steppes' voluntary dismissal was "with prejudice" against Steppes and in Armstrong's favor. In Steppes' Memorandum in Support of Motion to Clarify and/or Reconsider Order Modifying Plan of Reorganization, Background ¶5, Steppes states: "Subsequent to the entry of the Litigation Injunction, the parties took action to substantially consummate the Plan of Reorganization, including the disbursement of money and the dismissal of several lawsuits *with prejudice*." *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2455 (1990) Steppes, Segal and the Bankruptcy Court rely on some of the interlocutory orders for preclusive effect against Armstrong. This Court has never addressed the preclusive effect of interlocutory orders in favor of one party that voluntarily dismisses a case with prejudice.

The general rule relating to the preclusive effect of prior orders in a dismissed case is that the prior orders

have no preclusive effect. *Effect of Nonsuit, Dismissal, or Discontinuance of Action on Previous Orders*, 11 A.L.R.2d 1407, § 3, 6 (citing numerous cases for this proposition) *Winchester Homes, Inc. v. Osmose Wood Preserving, Inc.*, 37 F.3d 1053, 1058 (C.A.4,1994)

The interlocutory orders were never appealable denying Armstrong the right to review of those orders. Armstrong asserts that Steppes gave up any benefit from the interlocutory orders by voluntarily dismissing the case. This issue presents two important issues: 1) whether interlocutory orders are entitled to preclusive effect when a case is dismissed; and 2) whether any order is entitled to preclusive effect if the losing party does not have the opportunity to appeal the order for any reason. Armstrong submits that to give preclusive effect to an interlocutory order without the ability to appeal is an unconstitutional deprivation of a party's right to appeal and be heard. It is critical that this Court answer these questions.

4. **CAN PENALTIES OF OVER $2.8M IN RELATION TO ZERO ACTUAL DAMAGES AGAINST NON-DEBTORS PROVIDE STANDING TO AN ALLEGED CREDITOR AND ARE THESE PENALTIES UNCONSTITUTIONALLY EXCESSIVE? CAN ANY EXEMPLARY DAMAGES BE AWARDED WITHOUT AN AWARD OF ACTUAL DAMAGES?**

All of this litigation is based on Steppes' pursuit of the over $2.8M in statutory and common law forfeitures and penalties in the Modified Judgment where Steppes was awarded zero actual damages. (App. E) No court has ever reviewed the unconstitutionality of these forfeitures and penalties especially based on a *de novo* review. *Cooper* Steppes' claim in MPV was allegedly based on collecting these unconstitutional forfeitures and

penalties. Through the MPV plan Steppes was able to obtain a settlement that allowed Steppes to continue to pursue these unconstitutionally excessive penalties against Armstrong and the Trusts while Armstrong and the Trusts were enjoined from presenting their claims or even defending themselves. (App. I, C & H) Armstrong was not a party to the Texas Litigation and did not waive any right to present these defenses. *Armstrong v. Steppes Apartments, Ltd.* 57 S.W.3d 37, 40 Fn. 1 (Tex.App.-Fort Worth,2001)

This Court has addressed the unconstitutionality of punitive damages several times. *BMW* and *State Farm* This Court upheld the *BMW* tests in *State Farm* and ruled courts cannot punish parties for out of state conduct or being "unsavory characters". *State Farm* at 1523 This Court addressed the unconstitutionality of excessive penalties based on the Eighth Amendment in *Bajakajian.* This Court has not specifically applied *BMW*, *State Farm, Cooper* and *Bajakajian* to statutory or common law civil penalties and forfeitures. Forfeitures have been addressed such as in *Bajakajian.* These cases all support an application of these principles to statutory or common law civil penalties. There is certainly no reason that these principles should not apply to statutory or common law civil penalties and forfeitures.

Armstrong will present a comprehensive analysis of the tests and reasons supporting Armstrong's contentions in the brief if the Court grants the petition. This Court well knows the *BMW* tests: the degree of reprehensibility; the disparity between the harm or potential harm compared to the penalties; and the difference between the penalties and the civil penalties authorized or imposed in comparable cases. *BMW* at 1598

Here the Trusts' actions were to comply with a court order by providing a settlement offer and

spreadsheets with the court's promise of immunity and threat of incarceration. These actions are not reprehensible. This test fails. The ratio of penalties to actual damages is infinite ($2.8M to zero) and incomparable. Many states, including Texas, now specifically hold that no exemplary damages can be awarded without an award of actual damages. Tex. Civ. Prac. & Rem. Code § 41.004(a) (App. D § 11) Steppes never claimed actual damages much less were awarded actual damages. This test fails. Usury is a misdemeanor in Texas warranting up to a $1,000.00 penalty. Tex. Fin. Code. Ann. § 305.001 (App. D § 12) There are two Trusts so the maximum penalty was $2,000.00 compared to over $2.8M in penalties. This test fails. All three *BMW* tests fail.

Numerous lower courts have evaluated penalties in relation to net worth. This Court has not specifically addressed forfeitures and penalties in relation to a defendant's net worth. In this case, the $2.8M in penalties is over double the entire net worth of the Charitable Trust and at least 40% of the alleged net worth of the Family Trust. There is evidence in the records of these amounts and the Trusts and Armstrong never had any opportunity to challenge the penalties. The first time the amounts of the excessive penalties were presented was in the judgment entered after the August 1996 trial. The amount of the penalties was not requested or presented at the trial. Punishment or penalties are meant to punish not destroy. *Browning-Ferris Industries of Vermont, Inc. v. Kelco*, 109 S.Ct. 2909, 2926 (1989) These penalties destroyed the Trusts and Armstrong. Steppes' goal was to destroy the Trusts and Armstrong so they could not defend themselves or respond and Steppes has been completely successful. *E.E.O.C. v. HBE Corp.* 135 F.3d 543, 557 (C.A.8 1998) (Penalties of 5% of net worth excessive); *Sierra Club*

Foundation v. Graham, 85 Cal.Rptr.2d 726, 743 (Cal.App. 1 Dist.,1999) (noting general 10% of net worth limit); and (more cases will be presented in any brief).

Forfeitures and penalties are to be reviewed *de novo*. *Cooper* at 1685 and *Bajakajian* at 2037 Statutory and common law civil penalties must be reviewed *de novo*. There has NEVER been a *de novo* review of these penalties. Armstrong is entitled to this *de novo* review. It is critical that this Court grant this petition and review these penalties *de novo* and vacate the penalties as they relate to the MPV estate, the Trusts and Armstrong.

These issues remain relevant and ripe because these penalties are penal in nature; not entitled to full faith and credit and still affect Armstrong today. *State Farm* at 1522 (referring to *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States")) The Settlement specifically provides that the penalties remain effective against the Trusts and Armstrong despite the Settlement and Armstrong's bankruptcy discharge. (App. I)

If this Court believes *BMW* and *State Farm* already apply to civil penalties then this is another example of courts ignoring this Court's precedent as the Utah Supreme Court did in *State Farm* (petition pending).

It is critical that this Court grant this petition to apply the *BMW* and *State Farm* tests to civil penalties and confirm that penal judgments are not entitled to full faith and credit. *State Farm* at 1522 It is critical that this Court grant this petition to insure that civil penalties are reviewed *de novo*. It is critical that this Court grant this petition to, once again, tell the courts of this country that they cannot punish parties with unconstitutionally excessive penalties of any kind. It is critical that this

Court grant this petition to enter a decision that no penalties can be awarded in the absence of an award of actual damages. None of this mass of litigation ever would have occurred had this rule been honored—especially since Steppes never claimed any actual damages.

The *Huntington v. Attrill, 146 U.S. 657, 664 (1892)("Attrill")* case is over 100 years old. The *Attrill* case is often quoted as stating that penalties *in the international sense* are not entitled to full faith and credit. Numerous courts have used this distinction of "in the international sense" to not apply *Attrill* to obvious penalties. The interpretation and application of *in the international sense* has created confusion. It is critical that this Court clarify *in the international sense* or merely clarify that penal judgments are not entitled to full faith and credit. Steppes argued continually that the Texas usury statutes were not penalties that the "executive of the state" could pardon. *Attrill* at 667-669 There are almost no penalties in this day and age that can specifically be pardoned by the head of a state. This particular phrase, *in the international sense,* is used to complicate the question of whether a judgment is penal or not.

This Court has addressed the concept of penal repeatedly but not specifically in relation to full faith and credit. There are numerous definitions of penal. Surely the $2.8M in Texas usury penalties is punishment and in fact, the Texas Supreme Court has labeled them penal. *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473 (Tex. 1988) ("The penalty in usury cases given to the "usuree" is a boon or a windfall which he is allowed to receive as a punishment to the usurious lender, not as interest for the use of the borrower's money.") Yes, despite this declaration by the Texas courts, Steppes argues that the penalties in the Modified Judgment are

entitled to full faith and credit because they are not penal *in the international sense* and cannot be pardoned. This additional language in *Attrill* continues to confuse this issue. *Testa v. Katt*, 67 S.Ct. 810, 812 (1947) (considering federal penalties v. state penalties) It is only this Court that can answer this question. Armstrong submits that it is critical that this Court update the penal exception to full faith and credit to eliminate the terms *in the international sense* and *that can be pardoned.* Penalties are either penal or they aren't. The $2.8M in penalties is clearly penal as confirmed by the Texas Supreme Court.

This Court is very familiar with the *BMW* and *State Farm* concepts. Armstrong merely refers the Court to the Court's own extensive opinions on these matters. This situation is the perfect opportunity to address the *BMW* tests in relation to excessive civil penalties and forfeitures where over $2.8M in penalties and forfeitures were assessed in relation to zero actual damages created through the judicial process and court ordered settlement documents with the court's promise of immunity. To punish any party for complying with court orders with the promise of immunity and threat of incarceration is ludicrous but to punish a charitable trust is abominable.

Here are three very important issues this Court should address in this case: 1) that *BMW* applies to civil penalties other than punitive damages; 2) that no penalties can be awarded without an award of actual damages (there is no purpose in punishing anyone and taking the precious time of the legal system when there are no damages); and 3) to update and clarify the definition of penal judgments that are not entitled to full faith and credit.

5. CAN A BANKRUPTCY PLAN OF REORGANIZATION BE APPROVED BASED ON PAYING ALL UNSECURED CREDITORS WHEN

ONE UNSECURED CREDITOR HAS NOT BEEN PAID AND THAT CREDITOR WAS DENIED THE RIGHT TO A HEARING?

The Bankruptcy Code provides that a plan of reorganization must pay all unsecured creditors in full at least as much as the creditor would have received under a chapter 7 liquidation. 11 U.S.C. § 1129(a)(7)(A)(ii) and (b) (App. D § 13) Segal allegedly paid all unsecured creditors in full and had remaining funds. Segal did not pay Armstrong for the Transwest Credit Union Claim of $7,319.05.

The Transwest Claim was an automobile loan secured by a 1993 Suzuki. The claim consisted of a secured claim to the extent of the value of the 1993 Suzuki. The deficiency caused by the 1993 Suzuki being valued less than the $7,319.05 is an unsecured claim. The Bankruptcy Court ordered Segal to surrender the 1993 Suzuki to Armstrong. Segal filed an objection to Armstrong's claim as an unsecured claim on March 7, 2002. No order shortening time was granted. Segal scheduled a hearing on Segal's objection to claim for March 11, 2002 only four calendar days, (including a weekend) after March 7th. Judge Clark held that an objection to claim required 30 days notice citing F.B.R.P. 3007. (App. D § 14) No hearing was held on Segal's objection. Judge Clark ruled that Segal was to resolve the Transwest Claim by surrendering the 1993 Suzuki and allowing Armstrong to have an unsecured claim. Segal paid all other unsecured claims in full. These facts are undisputed. The issue is the application of the law to these facts in that the Bankruptcy Court approved the MPV Plan in violation of 11 U.S.C. § 1129(a)(7)(A)(ii) and (b) (App. D §13).

Armstrong voted against approval of the MPV Plan and Segal did not pay the Transwest Claim. The Plan could not be approved according to the bankruptcy

code. Segal did not pay Armstrong for the unsecured portion of the Transwest Claim. This issue continues despite the Tenth Circuit's finding that the MPV Plan was consummated even though the Transwest Claim was never paid. *In re Beyond.com Corp.*, 289 B.R. 138, 146 (Bkrtcy.N.D.Cal.,2003)

The Bankruptcy Code is clear that ALL creditors must either approve the plan or be paid in full. 11 U.S.C. § 1129(a)(7)(A)(ii) and (b) (App. D §13) That simply did not occur here. Judge Clark and Segal ignored the Bankruptcy Code to Armstrong's detriment. A plan of reorganization cannot be confirmed unless the plan fully complies with all provisions of 11 U.S.C. § 1129. The MPV Plan did not comply with 11 U.S.C. § 1129(a)(7)(A)(ii). There are no findings in the lower courts regarding whether Armstrong received the appropriate value for the Transwest Claim. However, the facts are clear that Armstrong did not receive any distribution for the unsecured portion of the Transwest Claim and all other unsecured creditors were paid in full. The MPV Plan must be reversed for not complying with Section 1129. *Tripp v. Prock*, 865 F.2d 265, 3 (Table) (C.A.9 1988)

The Bankruptcy Code is also clear that any plan must fully comply with 11 U.S.C. § 1129. There can be no dispute that the MPV Plan does not fully comply with § 1129. The real issue here is whether bankruptcy judges can take it upon themselves to ignore the Code and rule whatever they want, especially against a particular pro se party. The law is the law and it applies to everyone. Courts cannot rule against anyone because they are "unsavory" or any other reason. *State Farm* at 1523

While it may seem insignificant to this Court that Segal did not pay one unsecured claim to Armstrong, this is still a clear violation of the Code that Judge Clark and the Tenth Circuit ignored. These same courts do

everything possible to find anyway to rule against Armstrong including ignore, jurisdiction the Bankruptcy Code, notice, due process and this Court's decisions.

CONCLUSION

The law is to apply equally to everyone including allegedly unsavory pro se parties. *State Farm* at 1523 This Court has consistently upheld the rights of all types of parties including prisoners, rapists, murderers, terrorists and criminals. This Court must uphold the rights of pro se parties, such as Armstrong, as well. If this Court will protect all parties **except** normal citizens such as pro se Armstrong, then the Constitution is failing. These issues certainly merit this Court's attention to insure, once again, that all parties are entitled to the law and all that it provides. *Mullane, Peralta, State Farm, BMW, Manzo* etc.

The real issue, in all these questions, is how the lower courts ignored clear law and this Court's decisions to find ways to rule against Armstrong and enjoin Armstrong and others without jurisdiction, authority or notice. This is a repeating theme throughout all these proceedings. Entering the Injunction protecting Steppes and friends from Armstrong, the Trusts and the Beneficiaries is a blatant violation of the Code where the Court had no jurisdiction. It is critical that this Court address these issues and clarify the law. This issue involves due process, notice, absence of jurisdiction, violations of the Bankruptcy Code and other violations. If the MPV Plan is fully consummated, the Injunction is not related to MPV. The Injunction is merely for Steppes benefit when Steppes should not have even filed a claim in the MPV case.

It is a denial of Armstrong's constitutional right to access to the courts to claim that a permanent injunction is moot and not review Armstrong's issues. A permanent injunction is never moot by definition. It is

critical that this Court reverse the Tenth Circuit and order that Armstrong's issues be addressed by judges that will actually consider Armstrong's issues and claims. The Tenth Circuit will not; regardless of what this Court rules.

It is time that this Court addressed bankruptcy court authority and jurisdiction in relation to permanent injunctions, who they can affect, who they can protect and for how long they can stay in effect. The Injunction here has nothing to do with MPV and if the MPV case is fully consummated, there is no purpose for the Injunction. The circuits disagree on this issue.

There is an open question apparently as to the effect of interlocutory orders in dismissed cases. The Utah courts have found ways to apply preclusion principles against Armstrong from interlocutory orders in cases that were dismissed with prejudice in Armstrong's favor. There can't be rulings against Armstrong in cases that were dismissed with prejudice in Armstrong's favor. By definition, a dismissal with prejudice against a plaintiff is a "loss" against the plaintiff on all of the plaintiff's claims and cannot be rulings against the defendant at the same time. This issue requires this Court's attention.

It is critical that this Court apply the *BMW, State Farm, Cooper* and *Bajakajian* principles to statutory forfeitures and civil penalties and for the Court to hold that there simply cannot be any exemplary damages or punishment when the defendant caused no harm. This is relevant here because the Injunction and the Plan revolve around Steppes while Steppes is not entitled to any relief or consideration since the $2.8M in penalties are unconstitutionally excessive. Without the $2.8M in penalties, Steppes has no standing. None of this horror of litigation ever would have occurred if courts had followed these principles—as this Court has continually

commanded. Even in *State Farm*, the Utah Supreme Court ignored this Court's directions requiring further litigation in that case. (Petition pending)

Settlements cannot be used to circumvent the law even in bankruptcy. Plans of reorganization are essentially massive settlements. Segal, Steppes, Rushton and Judge Clark used the MPV Plan and the Settlement to circumvent the law and the Code including without due process and notice. Settlements cannot be used to create jurisdiction or to avoid the duty to notice all interested parties. This Settlement was an agreement by the parties on one side of a dispute to destroy and enjoin the other side without the other side's participation or notice. F.B.R.P. 3007 cannot be avoided through settlements. Non parties cannot be enjoined through settlements. One side of an adversarial proceeding cannot "win" through a fabricated settlement avoiding due process and the protections of full legal proceedings, including discovery. A bankruptcy court cannot use a settlement to expand jurisdiction and authority. It is critical that this Court provide direction as to bankruptcy court jurisdiction and that settlements and plans cannot be used to ignore the Code etc.

It is also critical that this Court confirm that bankruptcy courts cannot approve plans of reorganization that do not comply with Section 1129. There is no question that Segal did not pay all unsecured creditors; and therefore, Segal did not fully comply with Section 1129. 11 U.S.C. § 1129(a)(7)(A)(ii) The MPV Plan was approved despite this. Alleged consummation of the MPV Plan cannot correct the simple fact that the MPV Plan was approved in violation of the Code and must be vacated. Segal, Steppes and Rushton cannot benefit by allegedly consummating a plan that is in violation of the Code. Again, it is critical that this Court address this issue and uphold the law. The alternative is merely to

give bankruptcy courts unlimited authority and jurisdiction to ignore the law.

All parties are entitled to notice, due process, discovery and a full and fair opportunity to be heard regardless of their religion, age, sex, political associations, representing themselves in court, race, status, personal relationships etc. It is not so much the attorneys that abuse the legal system; it is the judges that allow them to abuse the legal system[2]. It is up to this Court to send a message to the courts all over the United States that the law is to be applied equally and that every person, regardless of any reason or class, including self-representation, is entitled to due process to its fullest extent including the constitutional right to access to the courts. It is clear discrimination for the courts to deny parties representing themselves the right to access to the courts.

Allowing this horror to continue unabated is a message to U.S. citizens that judges, legislators and attorneys are entirely above the law and, in fact, there

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[2] Here is an example of how laws are applied unequally: Steppes and Feece argue that Armstrong is precluded from defending himself against Steppes and Feece using the Texas Modified Judgment against Armstrong, individually, even though Armstrong was not a party, and was never named, in the Texas Litigation. Steppes and Feece judicially admitted that Armstrong wasn't liable on the Texas Modified Judgment. At the same time, Steppes and Feece relitigate all the issues they did and could have litigated against the Trusts and Armstrong, relentlessly year after year, including the issues Steppes and Feece lost in the Texas Litigation. Steppes and Feece's position is apparently that preclusion principles only apply to prevent Armstrong, a non-party, from defending himself; that the part of the Texas Modified Judgment that specifically excludes Armstrong, individually, has no effect; and that Steppes and Feece can continue to relitigate the same claims and issues forever. However, all the Defendants and other courts allow Steppes and Feece to maintain these positions.

really is no law for the average U.S. citizen especially representing themselves.

Even pro se parties are entitled to constitutional access to the courts without additional infringements and burdens. This Court has continually upheld due process rights and matters. It is necessary for this Court to once again apply the constitution strictly for all people. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2648 (U.S.,2004) (referring to numerous other Supreme Court decisions)

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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October 5, 2004

TABLE OF CONTENTS
FOR APPENDIX

APP. #	DESCRIPTION	PAGE #
A	Order and Judgment in Case 03-4005 entered on May 27, 2004	1a
B	Order in Case 2:02CV00567 entered on December 12, 2002	4a
C	MPV Confirmation Order	7a
D	Constitutional Amendments and Statutues	20a
E	Texas Modified Judgment	26a
F	Summary Judgment Order on Wrongful Liens	35a
G	Hearing Excerpts on Writ of Attachments in Case 99-2218	43a
H	Judge Cornish Order	45a
I	Settlement Agreement	49a
J	Certificate of Service	77a

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
May 27, 2004
PATRICK FISHER
Clerk

DONALD E. ARMSTRONG, Appellant, v. ROGER G. SEGAL, as Trustee of the Mountain Pacific Ventures, Inc.; STEPPES APARTMENTS, LTD. Appellees.	No. 03-4005 (D.C. No. 2:02-CV-567-BSJ) (D. Utah)

ORDER AND JUDGMENT*

Before **McCONNELL, ANDERSON**, and **BALDOCK,** Circuit Judges.

After examining the briefs and appellate record,

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34,1(G). The case is therefore ordered submitted without oral argument.

Appellant Donald E. Armstrong owned and controlled debtor Mountain Pacific Ventures, Inc. (MPV), which voluntarily filed a chapter 11 bankruptcy petition. Appellee Roger G. Segal (trustee) was eventually appointed trustee of the MPV estate. On December 19, 2001, the bankruptcy court issued a confirmation order approving the trustee's proposed reorganization plan for MPV. Armstrong, as an unsecured creditor of MPV, appealed the confirmation order to the district court but did not seek a stay of the order pending appeal. During the pendency of the appeal in the district court, the plan was substantially consummated and all unsecured creditors, including Armstrong, were paid in full with interest.

On December 12, 2002, the district court held that the appeal was moot and, alternatively, that the bankruptcy court had committed no reversible error of law or fact. Armstrong appeals that order to this court.

Our jurisdiction arises under 28 U.S.C. § 158(d) and, after reviewing the order of the district court, the applicable law and the submissions of the parties, we affirm. A later and unrelated holding of the BAP regarding the bankruptcy court's jurisdiction to enter criminal sanctions against Armstrong has no bearing on this appeal.

Armstrong's motion to file a supplemental

appendix is GRANTED. The judgment of the district court is AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

FILED
12 DEC 02 PM 2:52
DISTRICT OF UTAH
BY: DEPUTY CLERK

DONALD E. ARMSTRONG Appellant, v. ROGER G. SEGAL, Trustee of Mountain Pacific Ventures, Inc. Bankruptcy Case 99-22588, Respondent.	Case No. 2:02-cv-00567 Judge: Bruce S. Jenkins

ORDER

The appeal filed in the above-referenced matter came on regularly for hearing before the Honorable Bruce S. Jenkins, United States District Court Judge, on

September 16, 2002. The appellant, Donald E. Armstrong, (the "Appellant"), appeared *pro se*. Julie A. Bryan appeared on behalf of Roger G. Segal, Trustee of the bankruptcy estate of Mountain Pacific Ventures, appellee ("Respondent"). Steppes Apartments Ltd. appeared through counsel, Jeff Shields. The Court, having reviewed the briefs on file, the law cited therein and having heard arguments presented, issues the following Findings, Conclusions and Order:

1. The "Trustee's Amended Plan of Reorganization dated December 19, 2002" (the "Confirmed Plan") was confirmed by the Findings of Fact, Conclusions of Law, and Order entered May 13, 2002 (the "Confirmation Order");

2. The Appellant did not seek stay of the Confirmation Order or post a bond on appeal but requested an extension of time for filing the Appellant's brief, which was granted by the Court.

3. Pursuant to the duties of the Respondent under the Confirmation Order, Respondent proceeded to consummate the Confirmed Plan.

4. The Confirmed Plan has been substantially consummated.

5. At this stage it is neither reasonable, equitable, nor possible to unravel what has been accomplished under the terms of the Confirmed Plan.

6. The instant appeal has been rendered moot.

7. Additionally, the Court has reviewed the Confirmation Order and the record on appeal and finds no reversible error of law or fact.

Based upon the foregoing findings and conclusions and as otherwise set forth in the record,

IT IS HEREBY ORDERED that the instant appeal is

dismissed as moot and that the Confirmation Order is affirmed.

DATED this 12 day of Dec 2002.

/s/
Bruce S. Jenkins
United States District Judge

APPENDIX C

Julie A. Bryan (Bar No. 4805)
COHNE, RAPPAPORT & SEGAL, P.C. 525 East 100 South, 5th Floor
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666
Attorney for Roger G. Segal,
Ch. 11 Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ENTERED
UNITED STATES
BANKRUPTCY COURT
DISTRICT OF UTAH
APR 15, 2002 3:48PM
WILLIAM C. STILLGEBAUER
CLERK OF COURT
BY: DEPUTY CLERK

In re:
MOUNTAIN PACIFIC VENTURES, INC., Debtor(s).

Bankruptcy No, 99C-22588
(Chapter 11)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CONFIRMING AND APPROVING TRUSTEE'S AMENDED PLAN OF REORGANIZATION DATED DECEMBER 19, 2001

The Trustee's Amended Plan of Reorganization Dated

December 19, 2001 (the "Plan") filed under Chapter 11 of the Bankruptcy Code, I1 U.S.C. § 101, et seq., was tiled by Roger A. Segal, Chapter 11 Trustee (the "Trustee") of the bankruptcy estate of Mountain Pacific Ventures, Inc. ("MPV "). Following the Court's approval of the Disclosure Statement for the Trustee's Amended Plan of Reorganization Dated December 19, 2001 (the "Disclosure Statement") by Order entered February 6, 2002, the Disclosure Statement, Plan, Notice of Hearing and, where appropriate, a Ballot, were transmitted to creditors and parties-in-interest. A hearing was held on March 11, 2002 to consider confirmation of the Plan, Appearances were made at the hearing as noted on the record.

One objection to confirmation of the Plan was timely filed by Donald E. Armstrong ("Armstrong").

The Court has reviewed and considered the Plan and Armstrong's objection to confirmation of the Plan. The Court also reviewed documentary and oral evidence presented and proffered and the argument of counsel. Accordingly, the Court finds and concludes as follows:

A. Jurisdiction. Confirmation of the Plan is a core proceeding under 28 U.S.C. § 157. This Court has jurisdiction with respect to these proceedings under 28 U.S.C. § 1334.

B. Notice. Notice to parties-in-interest of the time fixed for filing objections and of the hearing to consider confirmation of the Plan has been given and is sufficient pursuant to applicable law under, among other provisions, Sections 1126, 1128 and 1129 of the Bankruptcy Code and Fed. R. Bankr, P. 2002, 3017, 3018 and 3019. The solicitation package with respect to the Plan (which included the Plan, Disclosure Statement, a Notice Regarding Objection and Voting Deadlines, a Notice of Hearing on Confirmation of the Plan and, where applicable, a ballot) was properly served on all necessary parties. The Trustee has satisfied his obligations with respect to service of these

documents on parties-in-interest.

C. Acceptance. The balloting process on the Plan as conducted by the Trustee has been proper; and the Plan has been accepted in writing by the creditors whose acceptance is required by law.

D. Armstrong's Objection. The Armstrong Objection has been considered by the Court. The Court finds that it is reasonable and proper to amend the Plan to provide that the collateral securing Transwest Credit Union's claim (a 1993 Suzuki Sidekick) shall either be retained, in full satisfaction of the claim of Transwest Credit Union or surrendered to the Trustee within 60 days of the entry of this Order. In the event the collateral is turned over to the Trustee, the Trustee shall sell the collateral and turn the proceeds over to holder of the claim of Transwest Credit Union. In the event a deficiency exists in the amount necessary to satisfy the obligation owed, Transwest Credit Union, Transwest Credit Union or its assignee may file a proof of claim asserting an unsecured claim in the amount of the deficiency. The Trustee shall have 30 days thereafter to object to the claim. Any allowed unsecured claim shall be paid on par with other allowed unsecured claims under class 3 of the Plan. With said modification of the Plan, the Court finds the claim of Transwest Credit Union is unimpaired. Any and all objections raised by Armstrong to confirmation of the Plan are overruled.

E. Plan Conditions to Confirmation. All conditions to Confirmation set forth in the Plan have been satisfied or effectively waived.

F. Section 1129(a)(1). The Plan complies with the applicable provisions of the Bankruptcy Code, including without limitation the provisions of the Bankruptcy Code respecting classification of claims and the requirements of Section 1123 of the Bankruptcy Code.

G. Section 1129(a)(2). The Trustee has complied with the applicable provisions of the Bankruptcy

Code.

H. Section 1129(a)(3). The Plan has been proposed in good faith and not by any means forbidden by law.

I. Section 1129(a)(4). All trustee compensation and professional compensation and reimbursement of expenses for services and costs in or in connection with the case and in connection with the Plan and incident to the case has been approved or are subject to the approval of the Court as reasonable.

J. Section 1129(a)(5). The identify, qualifications, and affiliations of the person to be Plan Trustee after confirmation have been disclosed. The appointment of Roger G. Segal, or his assignee, as Disbursing Agent is equitable, consistent with the interests of creditors and the Debtor, and with public policy. The nature of the compensation to be paid has been fully disclosed. Mountain Pacific Ventures, Inc. shall be and hereby is a Reorganized Debtor. Kenneth A. Rushton, as trustee of the bankruptcy estate of Donald E. Armstrong, by virtue of this Order and the Plan, is hereby appointed as the sole interest holder and sole director of the Reorganized Debtor. Kenneth A. Rushton, as trustee of the bankruptcy estate of Donald E. Armstrong, shall have the sole right to manage or appoint managers as necessary for the day to day operations of the Reorganized Debtor and/or to effect a dissolution of the Reorganized Debtor as contemplated by the Plan, All other interests, rights, shares, options or any claim to any interest in the Reorganized Debtor are hereby cancelled and of no effect. As contemplated under the Plan and to the degree deemed advisable by the Trustee and/or by Kenneth A. Rushton, as trustee of the bankruptcy estate of Donald E. Armstrong, public records may be filed to reflect Kenneth A. Rushton, as trustee of the bankruptcy estate of Donald E. Armstrong, as the sole shareholder and director of the Reorganized Debtor,

K. Section 1129(a)(6). The Plan does not propose any changes of rates under the jurisdiction of any regulatory body and this section is therefore not applicable in this case.

L. Section 1129(4)(7). Each holder of a Claim or equity interest has accepted the Plan or will receive or retain under the Plan property of value, as of the effective date of the Plan, that is not less than the amount that such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date,

M. Section 1129(a)(8). The Court finds that Classes 1, 2A, 3 and 6 are not impaired and that Class 2B, as treatment of that class is modified under the instant Order, is not impaired. A Ballot Register was submitted at the time of hearing on confirmation *and shows* that the impaired Class 4 claim of Kenneth A. Rushton, Trustee of the Bankruptcy Estate of Donald E, Armstrong, has accepted the Plan. The general unsecured Class 3 has likewise voted to accept the Plan in that creditors who hold at least two-thirds in amount and more than one-half in number of claims in such class have voted to accept the Plan. Classes 1 and 2A are deemed to have accepted the Plan because no one in those classes voted on the Plan or objected to the Plan. Classes 5 and 6 voted to accept the Plan.

N. Section 1129(a)(9). Except to the extent that a holder of a particular claim has agreed to a different treatment of such claim, the Plan satisfies the requirements of Section 1129(a)(9) with respect to the payment of claims having priority under Section 507 of the Bankruptcy Code.

O. Section 1129(a)(10). Class 4 is an impaired class that has voted and accepted the Plan, determined without including any acceptance of the Plan by any insider.

P. Section 1129(a)(11). Confirmation of the Plan is not likely to be followed by the further liquidation or the need for further financial reorganization of the Debtor except

as provided in the Plan.

Q. *Section* 112.9(a)(12). All fees under 28 U.S.C. § 1930 have been or will be paid on the effective date of the Plan.

R. Section 1129(a)(13). Section 1129(a)(14) is inapplicable in this case.

S. Section 1129(b).

(1) Alternative Cramdown Findings with Respect to Class 2B. The Court has found that, as the Plan is amended by this Order, Class 2B is unimpaired and deemed to have accepted the Plan. Alternatively, the requirements of Section 1129(b) of the Bankruptcy Code have been met with respect to Class 2B under the Plan, as amended by this Order, because the Plan, as amended by this Order, does not discriminate unfairly and is fair and equitable with respect to said class, in that the Plan, as amended by this Order, provides for the sale or abandomnent of the property securing such claim with the holder of such claim receiving thereby either the property securing such claim or the proceeds of such sale to the extent of the allowed amount of such claim.

(2) Alternative Cramdown Findings with Respect to Class 3. The Court has found that Class 3 is an accepting class of claims and is unimpaired. Alternatively, the requirements of Section 1129(b) of the Bankruptcy Code have been met with respect to Class 3 under the Plan because the Plan does not discriminate unfairly, and is fair and equitable, with respect to Class 3.

(3) Litigation Injunction. The Plan provides for a "Litigation Injunction," more fully described as a permanent injunction enjoining Armstrong related entities from commencing or continuing litigation against the Steppes Parties (as defined in the Plan and the Settlement Agreement attached as Exhibit "B" to the Plan (the "Settlement Agreement")), Roger Segal, Kenneth A. Rushton, and any of those parties' principals, professionals,

agents, and assigns, based upon specific causes of action set forth herein. The Litigation Injunction further provides, among other things, that Armstrong must apply to this Court for authority to commence or continue any litigation against these parties. The Court finds that the Litigation Injunction is consistent with the Bankruptcy Code and the law established thereunder and is necessary to protect the integrity of the Estate. *In re Energy Co-op,* 886 F.2d 921 (7th Cir. 1989). It having been determined, after hearing on notice, that the Plan satisfies the requirements for confirmation set forth in 11 U.S.C. § 1129(a) and (b), and based on findings of fact and conclusions of law announced on the record and the foregoing findings of fact and conclusions of law, IT IS ORDERED that:

1. Modification of the Plan.. The Plan was modified to provide the following treatment for the claim of Transwest Credit Union: the Court finds that it is reasonable and proper to amend the Plan to provide that the collateral securing Transwest Credit Union's claim (a 1993 Suzuki Sidekick) shall either be retained by the holder of the claim, in full satisfaction of the claim of Transwest Credit Union, or surrendered to the Trustee within 60 days of the entry of this Order. In the event the collateral is turned over to the Trustee, the Trustee shall sell the collateral and turn the proceeds over to holder of the claim of Transwest Credit Union. In the event a deficiency exists in the amount necessary to satisfy the obligation owed, Transwest Credit Union or its assignee may file a proof of claim asserting an unsecured claim in the amount of the deficiency. The Trustee shall have 30 days thereafter to object to the claim. Any allowed unsecured claim shall be paid on par with other allowed unsecured claims under class 3 of the Plan. With said modification of the Plan, the Court finds the claim of Transwest Credit Union is unimpaired.

2. Confirmation of the Plan. The Plan, as modified by this Order, is confirmed and the Settlement

Agreement by and between the Trustee, Kenneth A. Rushton, as Trustee of the bankruptcy of Donald A. Armstrong, and Steppes Apartments Limited, which is attached as Exhibit "B" to the Plan and incorporated into the Plan (the "Settlement Agreement") is approved. A copy of the Plan is attached to this order as Exhibit "A".

3. Objections Overruled. Armstrong's Objection to confirmation of the Plan is overruled,

4. Implementation of the Plan. The Trustee is hereby authorized to take all steps and execute any and all documents necessary or appropriate to implement the Plan and the Settlement Agreement incorporated into the Plan.

5. Discharge of the Debtor. Except as otherwise provided in the Plan and in the Bankruptcy Code, effective on the Effective Date, to the extent permissible under Section 1141 of the Bankruptcy Code, the Debtor is discharged of all prepetition debts, claims against, liens on, and interests in the Debtor, its assets, or properties, which debts, claims, liens, and interests arose at any time before the filing of this Case.

6. Release of the Estate. Except as otherwise expressly provided in the Plan, on the Effective Date of the Plan, all Persons who have held, hold, or may hold claims, in consideration for the obligations of the Estate under the Plan, will be deemed to have forever waived, released, and discharged all rights or claims, whether based upon tort, fraud, contract, or otherwise, which they heretofore, now, or hereafter possess or may possess against the Estate existing prior to the Effective Date, except as set forth in the Plan.

7. Injunctions.

A. Permanent Injunction. Except as otherwise expressly provided in the Plan, all persons who have held, hold or may hold claims against the Debtor or interests in the Debtor are permanently enjoined from: a) commencing or continuing in any manner any action or other proceeding of any kind with respect to any such claim or interest against

the Debtor, the Debtor's bankruptcy estate, the Reorganized Debtor, the Trustee, the Trustee's professionals, affiliates, subsidiaries, or any of their respective officers, directors, employees with respect to any such claim or interest; b) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree, or order against the bankruptcy estate of the Debtor, the Debtor, the Reorganized Debtor, the Trustee, the Trustee's professionals, affiliates, subsidiaries, or any of their respective officers, directors, employees with respect to any such claim or interest; c) creating, perfecting or enforcing any encumbrance of any kind against the Debtor's bankruptcy estate, the Debtor, the Reorganized Debtor, the Trustee, the Trustee's professionals, affiliates, subsidiaries, or any of their respective officers, directors, employees or against the property of the Debtor, the Debtor's bankruptcy estate, the Reorganized Debtor, the Trustee, the Trustee's professionals, affiliates, subsidiaries, or any of their respective officers, directors, employees with respect to any such claim or interest; d) asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due the Debtor, the Debtor's bankruptcy estate, the Reorganized Debtor, the Trustee, the Trustee's professionals, affiliates, subsidiaries, or any of their respective officers, directors, employees or against the property of the Debtor, the Debtor's bankruptcy estate, the Reorganized Debtor, the Trustee, the Trustee's professionals, affiliates, subsidiaries, or any of their respective officers, directors, employees with respect to any such claim or interest; and e) any act, in any manner, in any place whatsoever, that does not conform to, or comply with, the provisions of the Plan; provided, however, that such permanent injunction shall not impair the rights of the Reorganized Debtor to prosecute any Debtor Action, as that term is defined under the Plan.

B. Litigation Injunction. Armstrong, the Donald E. Armstrong Family Trust, the Donald E.

Armstrong Charitable Remainder Unitrust, and any other entity related to Armstrong and controlled by him in whole or in part, now or in the future, and any other entity over which Armstrong asserts actual control in whole or in part, now and in the future, their agents, attorneys and those acting in concert with them, are hereby permanently enjoined from commencing or continuing any litigation against Steepes Apartments, Ltd. ("Steppes"), John Feece, Rosalie Feece, Baxter Holdings, Inc., Jeffrey L. Shields, Zachary T. Shields, Callister Nebeker & McCullough, Robert Bodoin, Hill Gilstrap, Frank Hill, Frank Gilstrap, Sal Espino, Chris Harris, Ben Levinson, Victor Vilaplana, Dennis Wickham, Elizabeth Smith, and Seltzer Caplin McMahon Vitek, and any and all other attorneys of Steppes and their law firms and all employees of such firms, Roger G. Segal as trustee in *In re Mountain Pacific Ventures, Inc.,* Bankr. Case No. 99-22588, Kenneth A. Rushton, ("Rushton")Trustee *in in re Donald E. Armstrong,* Bankr. Case No. 00-26592, and those parties' principals, professionals, agents, and assigns based upon (1) claims or causes of action released pursuant to the terms of the Plan and the Settlement Agreement, and (2) claims or causes of action based upon action taken by the Trustees, the Steppes Parties (all as defined in the Settlement Agreement) and any of those parties' principals, professionals, agents, and assigns in effectuating the Settlement Agreement and the Plan. *See also* Fed. R. Bankr. P. 3016(c)(2002).

Armstrong must apply to this Court for authority to commence litigation against any of these parties or their principals, professionals, agents, or assigns, must show that the proposed litigation does not violate the terms of this Plan, and must provide reasonable notice and opportunity to respond to the party against whom Armstrong wishes to proceed. The Court will grant such authority only upon a finding that such litigation does not violate the terms of this Plan, and this Litigation Injunction. If Armstrong applies to

the Court to pursue such litigation and his application is denied, then the party or parties responding to the application shall be awarded reimbursement of attorneys' fees and costs reasonably incurred in connection with the application, which the Court, in its discretion, may assess against Armstrong and/or which may be paid from funds remaining in the estate or from the Armstrong Estate under Paragraph 1.9 of the Settlement Agreement,

8. Revesting of Property. in the event Armstrong violates the permanent injunction set forth in the Plan by commencing or continuing litigation against Steppes, Segal, Rushton or any of those parties, principals, professionals, agents and assigns (including but not limited to those persons listed in paragraph I. C. of the Settlement Agreement) without bankruptcy court authority, and Segal receives reliable information to conclude that a violation of the permanent injunction may have occurred, Segal shall take reasonable actions to seek enforcement of the permanent injunction in the bankruptcy court and the cost of such enforcement, including necessary fees incurred by professionals, shall be considered a cost of administration of the Plan of Reorganization payable from funds remaining in the estate upon application to, and allowance by, the bankruptcy court and/or allowable for payment from the Armstrong Estate under paragraph I.G. of the Settlement Agreement. Except as otherwise expressly provided in the Plan (e.g. Distribution Fund, Disputed Claim Reserves, Post Effective Date Expense Fund) on the effective date of the Plan, the Reorganized Debtor will be vested with all of the assets and property of the Debtor's bankruptcy estate, free and clear of all claims, liens, encumbrances, charges, and other interests of claimants or interest holders, and may operate its business free of any restrictions imposed by the Bankruptcy Code or by the Bankruptcy Court. Such assets and property of the Debtor's bankruptcy estate include any and all rights of the Debtor or the Trustee which were

granted by various persons in settlement agreements which were approved by the Bankruptcy Court, such settlements having resolved litigation (or threatened litigation) initiated by the Trustee on behalf of the Debtor's bankruptcy estate, including but not limited to settlements reached in that certain litigation entitled Union Bank of California, N.A., Executor for the Estate of Adele Wolovnik, v. Donald F. Armstrong Et al, Case No. 727607, commenced in the Superior Court of the State of California, County of San Diego.

9. Debtor Actions Assigned. The Debtor Actions, as that term is defined under the Plan, shall be deemed vested in the Reorganized Debtor as a "representative of the estate appointed by this Court for such purposes under 11 U.S.C. § 1123(b)(3)(B) as of the effective date of the Plan. Mountain Pacific Ventures, Inc., the Reorganized Debtor shall be, and hereby is substituted as Plaintiff in the adversary proceeding entitled *Segal v. Steppes Apartments, Ltd.* Adversary Proceeding No. 99-2218. In accord with the Settlement Agreement and the Plan, *Segal v. Steppes Apartments, Ltd.* Adversary Proceeding No. 99-2218 is hereby distributed to the Reorganized Debtor of which Kenneth A. Rushton is sole interest holder and director and absent Order of this *Court,* no other party shall be deemed to have any rights as party plaintiff or plaintiff through intervention in such action. As contemplated by the approved Settlement Agreement, this Order and governing documents of the Reorganized Debtor, the Reorganized Debtor, controlled by Kenneth A. Rushton as sole shareholder and director, shall have the sole right to dismiss *Segal v. Steppes Apartments, Ltd.* Adversary Proceeding No. 99-2218.

10. Retention of Jurisdiction. The Court shall retain exclusive jurisdiction of this case for the purposes set forth in the Plan, including without limitation, to adjudicate all controversies concerning the classification or allowance

of claims, to make such Orders as are necessary or appropriate to aid the consummation of the Plan and to ensure the implementation of the provisions of the Plan and this Order in the manner provided under Section 1142 of the Code and Fed. R. Bankr. P 3020(d).

11. Plan and Order Binding. The provisions of the Plan and this Order are hereby made binding upon the Trustee, the Debtor, and any and all holders of claims against or interest in the Debtor, whether or not such claim or interest is impaired under the Plan, and whether or not such holder of a claim has accepted or rejected the Plan.

12. No Release of Regulatory Obligations. Nothing in this Confirmation Order or the Plan releases any entity from any liability to the United States or the State of Utah under any police or regulatory statute enforceable by the United States or the State of Utah, as the owner or operator of property after the Effective Date, nor shall anything in the Confirmation Order or Plan discharge any claim of the United States or the State of Utah under environmental statutes that arises after confirmation of the Plan.

13. Trustee to Give Notice of Entry of Confirmation Order. The Trustee shall give to all creditors and parties in interest notice by mail of the entry of this Order in accordance with Fed. R, Bankr, P. 2002(0(7) and shall file a certificate evidencing such service.

Dated this 1 day of May 2002.

BY THE COURT:

/s/

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D

1. U.S.C.A. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S.C.A. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. U.S.C.A. Const. Amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. U.S.C.A. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. 11 U.S.C.A. § 704

§ 704. Duties of trustee

The trustee shall--

(2) be accountable for all property received;
(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;
(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and
(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

6. § 1106. Duties of trustee and examiner

(a) A trustee shall--

(1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title;
(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;
(3) except to the extent that the court orders otherwise,

investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
(4) as soon as practicable--
(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and
(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;
(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case;
(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information; and
(7) after confirmation of a plan, file such reports as are necessary or as the court orders.

7. Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without

order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

8. V.T.C.A., Civil Practice & Remedies Code § 41.004

(a) Except as provided by Subsection (b), exemplary damages may be awarded only if damages other than nominal damages are awarded.

(b) Exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute.

9. 11 U.S.C.A. § 105(a)

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

10. 11 U.S.C.A. § 524(a)

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

11. Federal Rules of Bankruptcy Procedure, Rule 4007

(c) Time for filing complaint under § 523(c) in a chapter 7 liquidation, chapter 11 reorganization, or chapter 12 family farmer's debt adjustment case; notice of time fixed

A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

12. TX FIN 305.008. Criminal Penalty

(a) A person commits an offense if the person contracts for, charges, or receives interest on a transaction for personal, family, or household use that is greater than twice the amount authorized by this subtitle.

(b) An offense under this section is a misdemeanor punishable by a fine of not more than $1,000.

13. 11 U.S.C.A. § 1129 (a)(7)(A)(ii) and (b)

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the

effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

14. Rule 3007. Objections to Claims

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

APPENDIX E

ENTERED
May 8, 1997
THOMAS A. WILDER
DISTRICT CLERK
TARRANT COUNTY TEXAS

No. 67-156473-94

STEPPES APARTMENTS, LTD. Plaintiff, and JOHN L. FEECE, Intervenor Plaintiff, v. DONALD E. ARMSTRONG, TRUSTEE OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST, Defendant.	IN THE DISTRICT COURT TARRANT COUNTY, TEXAS 67TH JUDICIAL DISTRICT

MODIFIED JUDGMENT

ON THE 19th day of August, 1996, came on to be heard the above-styled and numbered cause. The Plaintiff, The Steppes Apartments, Ltd., appeared by and through its duly authorized representatives and its attorney of record. The Intervenor, John Feece, appeared in person, and by and through his attorney of record. The Defendant, Donald E. Armstrong, as Trustee of The Donald E. Armstrong Family Trust (the "Family Trust") and the Donald E. Armstrong Charitable Remainder Unitrust (the "Unitrust") appeared in person, and by and through his attorney of record.

The Plaintiff and the Intervenor announced ready. The Defendant as Trustee for the Unitrust and the Family Trust filed a Plea to the Jurisdiction to the Court or In the Alternative Plea in Abatement or Motion for Continuance.

The Court considered the Defendant's Plea to

the Jurisdiction of the Court or In the Alternative Plea in Abatement or Motion for Continuance. The Court found that the Court was entitled to proceed to the final exercise of jurisdiction over the subject matter of this suit despite the transfer of the two Notes made the subject of this suit by the Defendant to Wasatch Growth, L.L.C. ("Wasatch"), and Summit Growth, Inc. ("Summit"). The Court also found that the transfer by the Defendants pendente lite is subject to the lis pendens doctrine. Consequently, the Court finds that Summit and Wasatch are not necessary parties to this litigation, and that Defendant's Plea to the Jurisdiction to the Court or In the Alternative Plea in Abatement or Motion for Continuance should be DENIED.

IT IS, THEREFORE, ORDERED that Defendant's Plea to the Jurisdiction to the Court or In the Alternative Plea in Abatement or Motion for Continuance be and it is hereby DENIED.

No party having requested a trial by jury, the Court proceeded to hear the case. After the Court heard the evidence and rendered judgment in this cause on September 23, 1996, the Defendant, Donald E. Armstrong, Trustee of the Donald E. Armstrong Family Trust and the Donald E. Armstrong Charitable Remainder Unitrust, objected to the entry of judgment because of the failure of the Plaintiff to give notice to those persons or entities interested in the Donald E. Armstrong Family Trust and the Donald E. Armstrong Charitable Remainder Unitrust ("the Trust Estates") of this action pursuant to § 115.015 et seq., of the Texas Trust Code. Having considered the Defendant's objection, this Court vacated the previous judgment and ordered that Plaintiff give notice of this proceeding to those persons or entities interested in the trust estates. The Court also ordered those persons or entities interested in the trust estates to appear and show cause why this judgment should not be entered

("the Show Cause Hearing").

Thereafter, the Plaintiff and Intervenor served notice of the Show Cause Hearing by personal service and by certified mail, return receipt requested to those persons or entities interested in the Trust Estates. The Clerk of the Court also served the persons or entities interested in the Trust Estates with a Show Cause Order by certified mail, return receipt requested.

On the 31st day of March 1997 came on be heard the Show Cause Hearing. Donald E. Armstrong appeared in person and through his attorney of record both as trustee of the Trust Estates and as a person or entity interested in the Trust Estates. Jennifer Potter and Jerry B. James appeared in person and through their attorney of record asserting to be persons interested in the Trust Estates. The National Ability Center and the Boy's Club of San Diego appeared through their attorney of record. The Attorney General of the State of Texas waived notice of the Show Cause Hearing. Rosa Vasquez and Antoinette Vasquez Armstrong, as persons or entities interested in the Family Trust estate, did not appear at the Show Cause Hearing to contest the entry of judgment. Norman Nouskajian, as a person or entity interested in the Family Trust made no appearance and has made no appearance in this cause. John L. Feece appeared in person and through his attorneys of record on behalf of Plaintiff and the Intervenor. After hearing the evidence and argument of counsel, the Court is of the opinion and finds that the Proposed Modified Judgment previously served upon the persons or entities interested in the trust estates should be entered because the persons or entities interested in the Trust Estates failed to show cause as to why judgment in this case should not be entered.

IT IS, ACCORDINGLY, ORDERED, ADJUDGED, DECREED and DECLARED as follows:

1. Plaintiff substantially performed its obligations under the two Notes made the subject of this lawsuit and all liens securing their payment.

2. Defendant, Donald E. Armstrong, as Trustee of the Unitrust, is not entitled to accelerate the unpaid principal and interest balance of the Note made by Plaintiff on September 29, 1994, payable to the Order of the Unitrust ("The Unitrust Note"), in the original principal amount of $1,071,500.00, as of November II, 1994.

3. The Defendant, Donald E. Armstrong, as Trustee of the Family Trust, is not entitled to accelerate the unpaid principal balance of the Promissory Note made by Plaintiff on September 29, 1994, payable to the Order of the Family Trust ("The Family Trust Note") in the original principal amount of $375,250.00 as of November 11, 1994.

4. Defendant, as Trustee for both the Family Trust and the Unitrust does not now and has never had the right to impose a seven percent (7%) late charge on the unpaid principal balance of the Unitrust Note and the Family Trust Note.

5. IT IS, FURTHER ORDERED, ADJUDGED, and DECREED that Defendant, Donald E. Armstrong, as Trustee of the Unitrust, forfeit all principal as well as interest under the Unitrust Note.

6. IT IS, FURTHER ORDERED, ADJUDGED, and DECREED that Defendant, Donald E. Armstrong, as Trustee of the Family Trust, forfeit all principal as well as interest under the Family Trust Note.

7. The Unitrust Note is hereby declared to be null and void, and of no force and effect. Similarly, the Deed of Trust recorded in Volume 11743 at Page 0750 of the Deed of Trust Records of Tarrant County, Texas as well as all other liens securing the payment of such Note, is hereby declared null and void, and of no force and effect. Plaintiff owns the real property described on Exhibit "A" attached hereto free and clear of any liens securing the Unitrust Note.

8. The Family Trust Note is hereby declared null and void and of no force and effect. Similarly, the Deed of Trust recorded in Volume 11743 at Page 0775 of the Deed of Trust Records of Tarrant County, Texas, as well as all other liens securing payment of the Note to the Family Trust, are hereby declared null and void, and of no force and effect. Plaintiff owns the real property described on Exhibit "A" attached hereto free and clear of any liens securing the Family Trust Note.

9. Plaintiff have and recover judgment of and from Defendant, Donald E. Armstrong, as Trustee of the Unitrust (but not individually), in the amount of $495,783.22 as follows:

a. $160,864.65 representing three times the amount of usurious interest contracted for, charged or received as defined in Article 5069-1.06(1) V.A.T.S.;

b. $334,918.57, representing all amounts paid as principal as well as interest and all other charges on the Unitrust Note (which includes unused tax and insurance impounds and other sums paid into the Registry of this Court).

10. Plaintiff have and recover judgment of and from Defendant, Donald E. Armstrong, in his capacity as Trustee of the Family Trust (but not individually), in the amount of $391,128.62 as follows:

a) $61,353.18, representing three times the amount of usurious interest contracted for, charged, or received under the Note made payable to the Family Trust, as defined in Article 5069-1.06(1);

b) $329,775.44, representing all amounts paid as principal as well as interest and all other charges paid on the Family Trust Note (which includes sums paid on the Family Trust Note in the Registry of the Court).

11. The Clerk of this Court is hereby ordered to deliver to Plaintiff, the sum of

$138,861.34, together with interest earned on all funds deposited in the Registry of the Court. Donald E. Armstrong, in his capacity as Trustee of the Unitrust, is entitled to a credit of $49,036.26, together with interest earned on sums paid into the Registry of the Court on the judgment against him described in Paragraph 9 above upon the Clerk's payment as provided herein. Defendant, Donald E. Armstrong, in his capacity as Trustee of the Family Trust is entitled to a credit of $89,825.08 together with interest earned on sums paid into the Registry of the Court on the judgment against him described in Paragraph 10 above upon the Clerk's payment as provided herein. The District Clerk's delay of thirty (30) days in disbursing such funds is waived.

12. Plaintiff have and recover joint and several judgment against Donald E. Armstrong, in his capacity as Trustee of both the Unitrust and the Family Trust (but not individually), in the amount of $435,301.90, as reasonable and necessary attorneys fees for services rendered through time of trial.

13. Plaintiff have and recover joint and several judgment against Donald E. Armstrong, in his capacity as Trustee of both the Unitrust and the Family Trust (but not individually), the sums listed below as reasonable and necessary attorney fees for services rendered in the following circumstances:

$10,000.00 - in the event that Defendant files post-judgment motions, but such motions are denied by the trial court;

$30,000.00 - in the event that Defendant files an appeal to the Fort Worth Court of Appeals, but such appeal is unsuccessful;

$20,000.00 - in the event that Defendant files an Application for Writ of Error in the Supreme Court of Texas, but such application is not granted;

$10,000.00 - in the event the Application for Writ of Error to the Supreme Court of Texas is granted, but the appeal to Supreme

Court of Texas is unsuccessful;

$15.000.00 - in the event that Defendant files a Petition for Writ of Certiorari in the United States Supreme Court, but such petition is not granted;

$10,000.00 - in the event a Petition for Writ of Certiorari is granted, but the appeal to the United States Supreme Court is unsuccessful.

14. Defendant take nothing by virtue of its claims against Plaintiff and intervenor, and all affirmative relief sought by Defendant against Plaintiff and Intervenor is DENIED.

15. Defendant, Donald E. Armstrong as Trustee of both the Unitrust and the Family Trust, his agents, servants, employees and attorneys, be, and they are hereby permanently restrained and enjoined from: (i) declaring Plaintiff in default, and enforcing the Unitrust and Family Trust Notes (and the liens securing their payments), (ii) taking any action to collect the Unitrust and Family Trust Notes, and (iii) from prosecuting or seeking any relief in Cause No. CV-754507 filed in the Superior Court of Santa Clara County, California, styled Donald E. Armstrong, Trustee of the Donald E. Armstrong Family Trust and the Donald E. Armstrong Charitable Remainder Unitrust v. John L. Feece and Does 1 thru 20, against Plaintiff and Intervenor in any manner, or instituting or prosecuting any similar action against Plaintiff, (or any of its partners, including John L. Feece, Intervenor), which involves the Unitrust and Family Trust Notes, and (iv) foreclosing on the real property described in Exhibit "A" attached hereto or attempting to appoint a receiver or attempting to enforce any assignment of rents.

16. All costs of Court herein are taxed against the Defendant.

17. All writs and processes for the enforcement and collection of this Judgment or the costs of court may issue as necessary.

18. All other relief not expressly granted in

this Judgment is DENIED

19. This Judgment shall bear interest at the rate of 10% per annum from the date hereof.

SIGNED this 8TH day of May 1997.

\s\

JUDGE PRESIDING

Exhibit "A"

Lot D, Block 3, RIDGMAR PLAZA, an Addition to the City of Fort Worth, Tarrant County, Texas, according to plat recorded in Volume 388-26, Page 77, Deed Records of Tarrant County, Texas.
AND
Lot E, Block 3, RIDGMAR PLAZA, an Addition to the City of Fort Worth, Tarrant County, Texas, according to plat recorded in Volume 388-45, Page 84, Deed Records of Tarrant County, Texas.
AND
Part of Lot 16, Block 9, RIDGMAR, an Addition to the City of Fort Worth, Tarrant County, Texas, according to plat recorded in Volume 388-36, Page 30, Deed Records of Tarrant County, Texas, and being more particularly described as follows:
BEGINNING at the West corner of said Lot 16;
THENCE North 46 degrees 37 minutes East with the Northwest line of said Lot 16, 149.7 feet to the North corner of said Lot 16 a point on a curve in the Northeast line of said lot and in the Southwest line of Taxco Road from which the center of said curve bears South 46 degrees 42 minutes West 722.53 feet;
THENCE Southeasterly with said curve through a central angle of 3 degrees 22 minutes for a distance of 42.3 feet to the end of said curve;
THENCE continuing with said street and lot line South 39 degrees 56 minutes East 22.7 feet; THENCE South 52 degrees 09 minutes West 154.8 feet to a point on the Southwest line of said lot;
THENCE North 35 degrees 23 minutes West with said lot line 50.5 feet to the PLACE OF BEGINNING;
And being part of the property conveyed to George M. Underwood, Jr. and George M. Underwood, III by deed from J. C. Pace, Jr., dated March 1, 1972, recorded in Volume 5199, Page 925, Deed Records of Tarrant County, Texas.

APPENDIX F

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

ENTERED
UNITED STATES
BANKRUPTCY COURT
DISTRICT OF UTAH
SEPTEMBER 7, 2001
WILLIAM C. STILLGEBAUER
CLERK OF COURT
BY: DEPUTY CLERK

In re MOUNTAIN PACIFIC VENTURES, INC., Debtor.	Bankruptcy Case No. 99-2218 Chapter 11
ROGER G. SEGAL, Chapter 11 Trustee of the bankruptcy estate of MOUNTAIN PACIFIC VENTURES, INC., Plaintiff, v. STEPPES APARTMENTS, LTD. and Does 1 through 6 inclusive, Defendants.	Adv. Proceeding 99-2218 ORDER GRANTING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT

FACTS

In 1996, a Texas State Court entered a judgment against the Donald E. Armstrong Family Trust (the "Family Trust") and in favor of Steppes Apartments Ltd. ("Steppes") for violation of Texas usury laws. It ruled that notes totaling over $1,300,000.00 could not be collected by the Family Trust and awarded Steppes a judgment of $391,128.62 plus $530,301.90 in attorney fees.

In August of 1997, Steppes commenced an action in the United States District Court for the District of Utah naming only Donald Armstrong ("Armstrong") and the Family Trust as defendants.

On May 5, 1998, Steppes filed a motion with the United States District Court seeking leave to amend its complaint.

On May *6,* 1998, Steppes recorded a lis pendens in Summit County against the property owned by Armstrong, Willow Brook Cottages, LLC, and against all property owned by Mountain Pacific Ventures, Inc. ("MPV") located in Summit County.

On May 7, 1998, counsel for MPV wrote to counsel for Steppes, asking that Steppes immediately release or correct the lis pendens.

On June 18, 1998, the United States District Court granted Steppes' motion for leave to file amended complaint.

On June 18, 1998, Steppes filed its amended complaint which, among other things, added MPV as a defendant.

The amended complaint identifies numerous parcels of real property located in Summit County, Utah, and seeks, in part, a judgment that real property which is property of the MPV estate be declared as vested in the Family Trust, that any fraudulent transfer of property to MPV be avoided, for damages against MPV and others, for an injunction against the MPV prohibiting the transfer or disposition of MPV's property, for the issuance of a declaratory judgment that MPV and others are alter egos of each other, for a declaratory judgment that Steppes' modified judgment is applicable to MPV and others, for the imposition of a constructive trust against MPV and others, and for an award of attorney fees and costs against MPV and others.

On March 10, 1999, MPV filed a Chapter 11 petition before this Court as case # 99C-22588.

On June 6, 1999, MPV initiated this adversary proceeding to have Steppes' lis pendens declared void or voidable as a wrongful lien and for a judgment declaring that Steppes has no claim against MPV or the estate of MPV.

On June 30, 1999, Steppes filed its proof of claim in this case. The proof of claim contains a five-page summary describing Steppes' theory of recovery including fraudulent transfer, civil conspiracy, abuse of the corporate entity /alter ego, ownership interest, constructive trust and other claims. The five-page summary refers to and incorporates a copy of Steppes' amended complaint filed in the United States District Court on June 18, 1998, as a source of many of the facts and causes of action underlying Steppes' claim/interest. The five-page summary and the amended compliant both contain numerous allegations that Armstrong was either the originator of or an intermediary of certain fraudulent transfers, civil conspiracies, instrumental in abuse of corporate entity, or an intermediary in a fraudulent transfer of stock. Other than the allegations involving Armstrong, the five-page summary and the amended complaint contain few specific allegations that are stated with particularity.[1]

On July 12, 1999, Roger G. Segal ("Segal") was appointed to serve as the Chapter 11 trustee of the MPV bankruptcy proceeding.

On June 15, 2000, Armstrong filed personal bankruptcy under Chapter 11 of the Bankruptcy

---

[1] Although Steppes' amended complaint contains seven causes of action including theories of alter ego, conspiracy, unjust enrichment, and constructive trust, each of Steppes' theories sound in fraud and are subject to the pleading requirements of Rule 9(b) as incorporated by F.R.B.P. 7009.

Code and was assigned case no. 00-26592.

On July 21, 2000, Segal filed a motion for summary judgment in this adversary proceeding seeking an order disallowing Steppes' claim against the bankruptcy estate of MPV and arguing that Steppes' lis pendens was a wrongful lien.

On September 13, 2000, Kenneth Rushton ("Rushton") was appointed as the Chapter 11 trustee in the Armstrong bankruptcy proceeding.

In October 2000, the Honorable Judith A. Boulden, ruled in the Armstrong bankruptcy proceeding, in part, that:

a. Steppes' proceeding on an alter ego action that is an asset of the debtor's bankruptcy estate would be a violation of the automatic stay;

b. Steppes' proceeding on a conspiracy theory, which would be an asset of the debtor's bankruptcy estate, would be a violation of the automatic stay;

c. To the extent of the transfers which were made directly from Mr. Armstrong to Mountain Pacific Ventures, Inc., Steppes' proceeding on a fraudulent conveyance action would be a violation of the automatic stay; and

d. Steppes' further proceeding in the Mountain Pacific Ventures, Inc. case would be a violation of the automatic stay.

On February 7, 2001, Steppes filed a cross motion for summary judgment on Segal's first cause of action seeking a ruling that Steppes' lis pendens was not a wrongful lien.

On April 17, 2001, Rushton filed a motion to intervene in this adversary proceeding arguing that as the trustee of the Armstrong bankruptcy estate, he has the sole right to seek recovery of property fraudulently

conveyed from Armstrong to MPV.

On May 23, 2001, Rushton's motion to intervene in this adversary proceeding was granted.

ANALYSIS

The propriety of filing a notice of lis pendens from a federal lawsuit is a matter governed by state law. Hamilton v. Smith, 80 F.2d 36 (10th Cir. 1986). Utah Code Annotated § 78-40-2 states as follows:

> In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

The statute is specific in its requirements. One is only permitted to file a lis pendens "at the time of filing the complaint or thereafter." Steppes filed its lis pendens on May 6, 1998, a full forty-two days prior to filing the amended complaint naming MPV as a defendant. The statute does not permit the filing of a lis pendens prior to the filing of the complaint. At the time Steppes filed its lis pendens against the MPV's property, MPV was not even a party to the lawsuit. Steppes' filing of a motion for leave to file amended complaint does not satisfy the requirements of U.C.A. § 78-

40-2. The motion for leave to file amended complaint did not make MPV a party to any lawsuit and did not make MPV's property the subject of a pending lawsuit wherein title to, or possession of MPV's property was put into controversy. A lis pendens that is not supported by a pending legal action is wrongful. Birch v. Fuller, 337 P.2d 964 (Utah 1959). The sole purpose of recording a notice of lis pendens is to give constructive notice of the pendency of the lawsuit. A lis pendens' only foundation is the legal action; it has no existence independent of it. Hansen v. Kohler, 55 P.2d 186 (Utah 1976). Further, a lis pendens that is wrongfully filed because it lacks a pending lawsuit to support it cannot be cured by the subsequent filing of a lawsuit. Winters v. Schulman, 977 P.2d 1218 (Utah App. 1999). Steppes' filing of a lis pendens against MPV's property prior to amending its complaint to name MPV as a party defendant was wrongful. Liability for such a wrongful lis pendens can be sought pursuant to Utah Code Annotated § 78-40-2. Winters v. Schulman, 2001 WL 357124 (Utah App. 2001).

STEPPES' PROOF OF CLAIM

Steppes' proof of claim seeks recovery under a number of theories that originate with Armstrong or involve Armstrong as an intermediary. Theories that involve Armstrong in such a way belong solely to Rushton, the trustee of the Armstrong bankruptcy estate, who holds the exclusive right to all property of the estate including all avoiding powers. For Steppes to proceed on an alter ego theory, conspiracy theory, fraudulent transfer theory, or other further proceeding that is property of the Armstrong's estate is a violation of the automatic stay. *See In re Donald E. Armstrong, No. 00-26592 (Bankr. D. Utah, October 31,* 2000).

Having determined that any theory of recovery that originates in Armstrong or involves Armstrong as an intermediary belongs solely to Rushton, the Court must now determine what remains of Steppes' claim in this bankruptcy

proceeding. The Court finds that it is not possible to determine what remains of Steppes' claim after deleting the Armstrong causes of action. This is because Steppes' proof of claim lacks sufficient detail to enable the Court to make such a determination. A complaint sounding in fraud must set forth the time, place, and contents of the fraudulent activity, the identity of the party involved in the fraudulent activity, and the consequences thereof. Rule 9(b)'s purpose is to provide notice of plaintiff's claims and the factual ground upon which they are based. A statement that alleges that misrepresentations were made and continue to the present time does not alert defendants to a sufficiently precise time frame to satisfy Rule 9(b) requirements. Koch v. Koch Industries, Inc., 203 F.3d 1202 (10th Cir. 2000). Once the causes of action belonging to Armstrong's bankruptcy estate are removed from Steppes' proof of claim, what remains of Steppes' claim is so vague and lacking in detail that it fails to meet the requirements of F.R.B.P. 9(b) and will be denied if not promptly amended.

Based upon the above, it is hereby

ORDERED that because Steppes' lis pendens does not comply with the requirements of Utah Code Annotated § 78-40-2, the lis pendens was wrongfully filed and is invalid, and it is further

ORDERED that Steppes' causes of action that either originate with Armstrong or involve Armstrong as an intermediary are disallowed, and it is further

ORDERED that the remainder of Steppes' proof of claim is denied for failure of Steppes to plead its claim with sufficient particularity. However, Steppes will be given fifteen days from the date of this Order to amend its proof of claim in a way consistent with this Order and to plead its claim with sufficient particularity to satisfy the requirements of F.R.B.P 7009, and it is further

ORDERED that upon being served with Steppes' amended claim, Segal shall have sixty days to object to the

amended claim if he so chooses.

DATED this _7_day of September, 2001.

BY THE COURT:

/s/
GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

APPENDIX G
EXCERPTS FROM HEARING TRANSCRIPT
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

In re:)
MOUNTAIN PACIFIC VENTURES, INC.,)
Case No. 99-22588
Debtor.)

MOUNTAIN PACIFIC VENTURES,)
Plaintiff,)
vs.) Case No. 99-2218
STEPPES APARTMENTS, LTD.,)
Defendant.)

***

BEFORE THE HONORABLE GLEN E. CLARK

Thursday, May 24, 2001
1:30 P.M.
CROSS MOTIONS FOR SUMMARY JUDGMENT

Page 1

THE COURT: You began your reply memorandum by stating the present motion can be resolved by answering one question. Does Steppes' amended complaint affect the title to or possession of MPV's real property in Summit County. Then you go on to refer to the complaint. Which I've done as well because I'd like to find an easy answer if I can. You say -- you refer the court to three counts. Count I, fraudulent transfer. And you state that Count I of the amended

complaint alleges that MPV was the recipient of fraudulent transfers. So, -- ..... .

Page 24

THE COURT: Take your time with this question because it's been bothering me.

Page 25

And I couldn't find anything in Count IV that identifies any real property of MPV which was fraudulently or otherwise transferred to it. . . . .

THE COURT: That's fine but you don't allege any property, real property of MPV in Count III, I don't believe. I was just concentrating on the counts that you called my attention to.

Page 26

THE COURT: Fine. You'd like to have a judgment lien on all of Mountain Pacific's property. But it doesn't seem to me that this is an action -- with respect to Mountain Pacific is an action affecting title to or right of possession of real property. You want a money judgment against MPV that will allow you to get its property, isn't that true? . . . . . .

THE COURT: I know what you want in the complaint. But in addition what you've gotten for yourself is a prejudgment writ of attachment.

Page 27

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
Entered on Docket: 09/08/2004

In re Donald Erwin Armstrong, Debtor.	Bankruptcy Case No. 00-26592 Chapter 11 ORDER GRANTING IN PART AND DENYING IN PART ARMSTRONG'S MOTION FOR PERMISSION TO FILE MOTION TO MODIFY PLAN OF REORGANIZATION

The motion of Donald Erwin Armstrong ("Armstrong") for permission to file motion to modify plan of reorganization came on for hearing on the 24th day of August at 1:00 p.m. before the Honorable Judge Tom R. Cornish. Armstrong appeared in behalf of himself, pm se, Steppes Apartments, Ltd. was represented by Jeffery L. Shields, and Zachary T. Shields, Keneth Rushton, the Chapter 11 Trustee of this bankruptcy proceeding (the "Trustee"), was represented by Lon Jenkins and Roger Segal, the trustee in the case of Mountain Pacific Ventures, Inc., was represented by Julie Bryant.

Although the motion before the court was a motion for permission to file a motion to modify the revised plan of reorganization, the parties argued both with respect to permission to file the motion as well as the merits of Armstrong's motion to modify the plan. That being the ease, the Court will rule on the motion for permission to file and will rule with respect to the merits of Armstrong's motion to modify

the confirmed plan.

Armstrong's motion seeks permission to modify a portion of the Chapter 11 plan confirmed by Order of the Court on January 31, 2002. Section 12.1.2. of the confirmed plan provides for a Litigation Injunction which enjoins Armstrong, the Armstrong Trusts, and all other Armstrong Entities from commencing or continuing any litigation against the Steppes Parties, Roger Segal, the Trustee and any of their principals, professionals, agents, and assigns based upon (1) claims or causes of action releases pursuant to the term of the plan and the Steppes Settlement and (2) claims or causes of action based upon action taken by the Trustee, Segal, the Steppes Parties and any of those parties' principals, professionals, agents, and assigns in effectuating the Steppes Settlement and this Ran. The injunction also provides that Armstrong must apply to the Court for authority to commence or continue litigation against any of these parties or their principals, professionals, agents, or assigns.

Armstrong argues, among other things, that the Litigation Injunction should be removed from the confirmed plan because at some time in the future, Steppes or one of the Steppes Parties may bring an adversary proceeding against Armstrong, the Armstrong Trusts or one of the Armstrong Entities and if the Litigation Injunction is not removed from the plan, Armstrong, the Armstrong Trusts and/or the Armstrong Entities will be prohibited from raising defenses and counterclaims in the adversary proceeding.

Armstrong's motion was opposed arguing that the Litigation Injunction was a necessary component of the confirmed plan, that parties have relied upon the Litigation Injunction and that the Code does not be permit modification of the confirmed plan by Armstrong.

11 U.S.C. § 1127(b) provides that the reorganized debtor may modify a plan at any time after confirmation and before substantial consummation of such plan. Because Armstrong is the reorganized debtor in this case, there is

nothing in § 1127 of the Code which prevents Armstrong from seeking to modify the confirmed plan.

The Court finds that the Litigation Injunction continues to be a necessary part of the confirmed plan and that it is not in the best interests of the estate or creditors for the Litigation Injunction be removed. This decision today is further necessitated by reason that this Court has entered filing restrictions because of Armstrong's disregard for the Litigation injunction. It should be noted that the Utah District Court, Bankruptcy Appellate Panel, and the Tenth Circuit Court of Appeals have also entered filing restrictions. With respect to Armstrong's concerns that the Litigation Injunction may prohibit the filing of defenses or counterclaims to adversary proceedings filed at some time in the future by Steppes or one of the Steppes parties, the Court will treat Armstrong's motion as a motion to modify under 11 U.S.C. § 1127(b) and will grant the motion with respect to the very narrow circumstances described above. Therefore, it is hereby

ORDERED that Armstrong's motion for permission to file a motion modify the Revised Plan of Reorganization is denied; and it is further

ORDERED that in the event and only in the event that Steppes or one of the Steppes Parties brings an adversary proceeding against Armstrong, the Armstrong Trusts or one of the Armstrong Entities and any time after August 25, 2004, the Revised Plan of Reorganization will be modified to permit Armstrong, the Armstrong Trusts and/or the Armstrong Entities to raise defenses and counterclaims in the adversary proceeding or proceedings brought by Steppes or one of the Steppes parties after August 25, 2004; and it is further

ORDERED that Armstrong's motion to modify the Revised Plan of Reorganization is denied in all other respects.

Dated this 3rd day of September, 2004,

BY THE COURT

/s/
Judge Tom R. Cornish
United States Bankruptcy Court

APPENDIX I
SETTLEMENT AGREEMENT

This Settlement Agreement is entered into between Steppes Apartments, Ltd. ("Steppes"); Kenneth A. Rushton ("Rushton"), Chapter 11 Trustee of the Donald E. Armstrong Bankruptcy Estate in Case No. 00-26592 (the "Armstrong Estate"); and Roger G. Segal ("Segal"), Chapter 11 Trustee of the Mountain Pacific Ventures, Inc., Bankruptcy Estate in Case No. 99-22588 (the "MPV Estate"). The parties hereby settle the claims in the above-stated bankruptcy cases using the following material points and terms:

I. SETTLEMENT BETWEEN STEPPES, RUSHTON AND THE ARMSTRONG ESTATE

I. A. The Texas Litigation.

I.A.1 Control and Dismissal of the Texas Litigation

Rushton will obtain control of the defendants' rights relating to the Texas litigation pending in the 67th District Court of Tarrant County, State of Texas, and related appeals giving rise to the Judgment attached hereto as Exhibit "A" (the "Texas Judgment") and the decision entered by the Texas Court of Appeals dated July 6, 2001 attached hereto as Exhibit "B" and all directly related litigation pending in Texas (hereinafter collectively the "Texas Litigation") which involve Donald E. Armstrong ("Armstrong") and/or certain Trusts related to or controlled by the Debtor including the "Donald E. Armstrong Family Trust" and the "Donald E. Armstrong Charitable Remainder Unitrust," (hereinafter collectively the "Trusts") and Steppes. Rushton, if necessary to effect

the intent of this paragraph, will seek a bankruptcy court determination that the Armstrong Estate is the real party in interest in the Texas Litigation, and will seek control of the Texas Litigation by taking over the Trusts and/or their assets in the following manner: through enforcement and execution of the judgments attached hereto as Exhibits C and D, through a foreclosure of the assets of the Trusts (the current appellants), through substitution as trustee of the Trusts, through revocation of the Trusts, or through stipulation to the oral ruling of Judge Stewart in the Federal Court litigation.

After obtaining control of the Texas Litigation, Rushton will obtain a dismissal with prejudice of the Trust's counterclaim and appeals in the Texas Litigation regardless of the procedural posture of the Texas Litigation. However, if the Texas Litigation has been finally resolved with no pending appeal or writ, Rushton shall obtain any residual rights of the Trusts in such litigation but need not obtain dismissal. After Rushton obtains control of the Texas Litigation and, to the extent necessary, obtains dismissal of the Trust's counterclaim and appeals in the Texas Litigation, Rushton will release and remove the lis pendens on the Steppes Apartments.

The dismissal of the Texas Litigation as set forth above will occur after the confirmation of a Plan of Reorganization in the Armstrong Chapter 11 case (the "Armstrong Case") which includes the approval of this Settlement Agreement. After obtaining control of the Trusts, Rushton shall also remove the Lis Pendens filed by the Trusts which encumber property owned by Steppes in Texas. It is anticipated that the dismissal of the Texas Litigation

and release of the Lis Pendens can occur within six months of the confirmation of the plan of reorganization in the Armstrong chapter 11 case. No ruling by any Court in the Texas Litigation shall have any impact on the obligations of the parties hereto to perform pursuant to this Settlement Agreement.

I.A.2 Continuing Effect of Judgment in Texas Litigation.

The Judgment entered in the Texas litigation shall remain in effect, except that any and all claims of whatever nature that Steppes holds, for monetary damages or otherwise, whether known or unknown, liquidated or unliquidated against the Armstrong Estate shall be deemed satisfied and discharged in full upon payment of the sum of $120.795.00 from the Armstrong Estate, as set forth under Section I.B. herein and upon compliance by Rushton with his other obligations herein.

I.A.3 Rights of Parties if Rushton Cannot Obtain Dismissal of Texas Litigation.

If Rushton is unable to comply with his obligations in Section I.A.1. of this Settlement Agreement (i.e., to gain control over the Trusts' position in the Texas Litigation, to effect the dismissal of any pending appeals or writs in the Texas Litigation, and/or to release the lis pendens against the Steppes Apartments), and if Rushton shows that he has pursued all of the methods set forth in Section I.A.1. of this Settlement Agreement in his attempt to comply (or if Steppes and Rushton shall agree that the further pursuit of any method would be pointless

and/or futile), then, despite any language to the contrary in this Settlement Agreement, the following shall apply:

Steppes shall be entitled to an allowed unsecured claim in this proceeding in the amount of $1,398,979.00 ("Steppes Unsecured Claim"). This unsecured claim is a compromise amount based upon the proof of claim filed by Steppes in the Armstrong case. The Steppes Unsecured Claim shall be treated pari passu with other unsecured claims filed in the Armstrong Estate and shall be discharged in a like manner to other unsecured claims treated under the plan filed in the Armstrong chapter 11 case. The allowance of the Steppes Unsecured Claim shall not affect the payment of $120,795.00 to Steppes as set forth in Section II of this Settlement Agreement which amount has already been deducted and considered in calculating the amount of the Steppes Unsecured Claim.

I.A.4 Stay of Litigation Pending Approval of this Agreement.

Rushton will not seek to intervene or participate in the Texas Litigation prior to the date of confirmation of a Plan of Reorganization in the Armstrong Case that includes the terms of this Settlement Agreement. However, Rushton does not oppose and Steppes' agrees that it may take efforts in Texas, if necessary in Steppes sole judgment, to stay any proceeding in the Texas Litigation pending confirmation of a Plan of Reorganization in the Armstrong Case, or take any other action in the Texas Litigation which may be based upon this Settlement Agreement.

I. B. Satisfaction of Steppes' Claim and Release of Rushton and the Armstrong Estate.

On the effective date of a Plan of Reorganization confirmed in the Armstrong Estate, and in accord with the terms of such a Plan of Reorganization, Steppes will be distributed $120,795.00 from the Armstrong Estate. After payment of such claim and after Rushton has performed all other obligations owing to Steppes, all claims of whatever nature that Steppes holds, for monetary damages or otherwise, whether known or unknown, liquidated or unliquidated against the Armstrong Estate and Rushton and/or the employees, professionals, agents, successors-in-interest and assigns of the Armstrong Estate and Rushton. The satisfaction of Steppes' claims under the instant paragraph shall not impair the ability of Steppes or Steppes principals, professionals, agents, successors-in-interest and assigns to apply for, be awarded and be paid, as necessary and allowable, administrative fee awards including fees incurred by professionals, agents, successors in interest, and assigns of the Armstrong Estate and Rushton as allowable under the Bankruptcy Code and this Settlement Agreement. Rushton and Steppes agree that Steppes may make a substantial contribution to the estate in aiding in obtaining and defending the confirmation of a plan embodying this Settlement Agreement.

If Rushton is able to take control of the Trusts and dismiss the the Trust's counterclaims in the Texas Litigation and any pending appeals or writs therein and effect the release of the Lis Pendens on the Steppes Apartments, and provide the Steppes Parties (defined below) with a complete release under the terms set forth in part I.C. below, then Steppes shall release the Trusts from any and all claims of whatever nature that Steppes holds, for monetary damages or otherwise, whether known or unknown, liquidated or

unliquidated, and Steppes shall thereafter, remove and/or release any notices of lis pendens and foreign judgments arising out of the Texas Judgment. Otherwise, the Trusts shall not be granted a release, and Steppes shall retain any and all claims which Steppes has against the Trusts less any payments actually received under this Plan.

I. C. Release of Steppes.

Upon the effective date of a Plan of Reorganization confirmed in the Armstrong Case and in accord with the terms of such a Plan of Reorganization and to the extent this Settlement Agreement is approved by the Bankruptcy Court, Rushton and the Armstrong Estate shall release the Steppes Parties (defined below) from any and all claims arising from events that occur before the effective date of the confirmation of the Plan of Reorganization including claims of any nature whatsoever that Rushton or the Armstrong Estate hold for monetary damages or otherwise, whether known or unknown, liquidated or unliquidated against Steppes, or Steppes' employees, principals, professionals, agents, successors-in-interest and assigns. The Steppes Parties include Steppes, as well as Steppes' employees, principals, professionals, attorneys, agents, successors in interest and assigns and shall specifically include, but are not limited to, the following persons/entities: The "Steppes Parties" shall include, but are not limited to, the following persons/entities: John Feece, Rosalie Feece, Baxter Holdings, Inc., Jeffrey L. Shields, Zachary T. Shields, Callister Nebeker & McCullough, Robert Bodoin, Hill Gilstrap, Frank Hill, Frank Gilstrap, Sal Espino, Chris Harris, Ben Levinson, Victor Vilaplana, Dennis Wickham, Elizabeth Smith, and Seltzer Caplan McMahon Vitek, and any and all other attorneys of Steppes or their law firms.
Steppes and Rushton agree that the release contemplated under this Settlement Agreement and the Plan to be

confirmed in the Armstrong Case shall be as broad as is permitted by law. The release includes, without limitation, any and all causes of action related to any and all pre-confirmation conduct of the Steppes Parties, as well as to any and all post-confirmation conduct taken in connection with the Armstrong Case. The release includes any and all claims related to conduct taken in the Texas Litigation, in the filing of foreign judgments, in the filing and pursuit of the Federal Court litigation, Case No. 2:97cv7663, in the filing of notices of lis pendens, and in participating in the present bankruptcy case, as well as other bankruptcy cases involving Donald Armstrong or entities related to or controlled by Donald Armstrong or MPV. The release includes, without limitation, any obligation arising under to the promissory notes made or guaranteed by the Steppes Parties. The release includes any and all claims which MPV or Segal may have against the Steppes Parties, including but not limited to claims which are controlled by Rushton pursuant to Section II of this Settlement Agreement, infra. Furthermore, as an integral part of this release, on the effective date of a Plan of Reorganization confirmed in the Armstrong Case, or within a reasonable time thereafter, Rushton shall dismiss with prejudice the "wrongful lien litigation" against Steppes pending in the bankruptcy case of MPV as Adversary Proceeding No. 99PC-2218, over which Rushton obtains control under Section II.B. of this Settlement Agreement.

To the full extent permitted by law and to the extent Rushton holds or obtains applicable rights, the release of the Steppes Parties set forth in this Settlement Agreement shall be given by all entities over which the Armstrong Estate and/or the Trusts has any control or interest -- whether as settlor, trustee, beneficiary, shareholder, member, creditor, judgment creditor, successor-in-interest, assignee, or otherwise. Such entities shall include, without limitation, Wasatch Growth, L.L.C., Summit Growth, Inc., Mountain Pacific Ventures,

Inc., and Willow Brook Cottage, LLC. Rushton agrees that Rushton will assert the Armstrong Estate's ownership and control over the Trusts and all other entities over which the Armstrong Estate and/or the Trusts has any control or interest -- as necessary to effectuate the release against the Steppes Parties. Rushton and Steppes believe that Donald Armstrong has asserted, is presently asserting, and in the future will assert that Donald Armstrong owns or controls claims or causes of action against the Steppes Parties. Rushton shall use his best efforts to obtain a ruling, in the plan confirmation process or prior to that time, that Donald Armstrong does not own or control any claims against the Steppes Parties, and that any and all claims or potential claims against any of the Steppes Parties are property of Rushton and/or the Armstrong Estate and are included in this release.

I. D. Injunction Against Future Litigation.

The Plan of Reorganization confirmed in the Armstrong Case shall also include a permanent injunction enjoining Armstrong from commencing or continuing any litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, agents and assigns, based upon claims or causes of action released pursuant to the terms of this Settlement Agreement or a Plan of Reorganization which includes the terms of this Settlement Agreement. The Plan of Reorganization shall also contain a permanent injunction barring Armstrong from commencing or continuing causes of action based upon any action taken by Rushton, Segal, the Steppes Parties, or any of their principals, agents, attorneys, and related parties, in effectuating the settlement and the plan. The injunction shall apply to Donald Armstrong, individually, the Trusts, as well as any entity related to Donald Armstrong and controlled by him in whole or in part or any entity over which Donald

Armstrong asserts actual control (the "Armstrong Entities").

To assure compliance with the injunction, Rushton shall seek a provision in any injunction to be approved as part of a plan of reorganization that Donald Armstrong must apply to the bankruptcy court for authority to commence or continue litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, attorneys, agents and assigns. If approved by the bankruptcy court, the injunction shall provide that if Donald Armstrong desires to file or pursue any claim or litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, attorneys, agents and assigns, Donald Armstrong must first file an application with the bankruptcy court, showing that the desired litigation does not violate the terms of the Plan of Reorganization confirmed in the Armstrong Case, including the release and injunction contained in that Plan. After providing notice and a reasonable opportunity for response by the Steppes Parties, Segal, Rushton (and/or any of those parties' principals, professionals, attorneys, agents and assigns), the bankruptcy court will make a determination whether Donald Armstrong shall be permitted to pursue such claim or litigation. The bankruptcy court will grant authority to Donald Armstrong to commence a suit against a released party only upon a finding that such litigation does not violate the terms of the Plan of Reorganization confirmed in the Armstrong Case, including the release and injunction contained in that Plan. In the event Donald Armstrong files an application with the bankruptcy court under this section, and such application is denied by the Court, then the Steppes Parties, Segal, Rushton (and/or any of those parties' principals, professionals, attorneys, agents and assigns) shall be awarded reimbursement of all attorney's fees and costs reasonably incurred in relation to the application --including fees incurred in responding to the application and in

attending any hearing on the matter. Such reimbursement shall be obtained by application to the bankruptcy court, and shall be paid from the assets of the Armstrong Estate and/or the Reorganization Trust described in Section I.E., infra. Such reimbursement shall reduce the amount of funds available for disbursement under the Reorganization Trust (as defined below).

In the event the Armstrong Entities violate the permanent injunction set forth in the Plan of Reorganization confirmed in the Armstrong Case, by commencing or continuing litigation against the Steppes Parties, Segal, Rushton or any of those parties principals, professionals, attorneys, agents and assigns without bankruptcy court authority, or otherwise, and in the event that Rushton receives reliable information to conclude that a suit has been commenced against one of the released parties without Bankruptcy Court authority, Rushton shall take reasonable actions to seek enforcement of the permanent injunction in the bankruptcy court. The reasonable cost of such enforcement, including fees incurred by professionals, shall be considered a cost of administration of the Plan of Reorganization payable from funds remaining in the estate and/or the "Reorganization Trust" upon application to the bankruptcy court, as set forth in Section I.G., infra.

In addition, the reasonable expenses incurred by the Steppes Parties, Segal, Rushton (and/or any of those parties' principals, professionals, attorneys, agents and assigns), in defending against any claim or litigation brought in violation of the release or injunction shall be payable to the party which incurred such expenses from funds remaining in the estate and/or the "Reorganization Trust" upon application to the bankruptcy court, as set forth in Section I.G., infra.

I. E. Escrow of Funds.

All funds, property and other rights remaining after payment of all allowed administrative, priority, secured and unsecured claims against the Armstrong Estate pursuant to the terms of a confirmed Plan of Reorganization (including the $120,795.00 claim of Steppes provided for under this Settlement Agreement) less any allowed reserve for administrative claims necessary to consummate or defend the plan on appeal shall be held by Rushton in a "Reorganization Trust" fund.

I. F. Use of Reorganization Trust Funds in the Event that the Armstrong Entities Do Not Violate the Injunction.

If the Armstrong Entities do not violate the release and injunction set forth in the plan of reorganization, Donald Armstrong shall be entitled to receive disbursements from the Reorganization Trust as follows: Sixty (60) days after the effective date of the plan, Armstrong shall receive a distribution in the amount of one-fifth of the money in the Reorganization Trust, or $100,000 whichever is less. One year thereafter, Armstrong shall receive a payment of one-fifth of the funds remaining in the Reorganization Trust. One year thereafter, Armstrong shall receive a payment of one-fourth of the funds remaining in the Reorganization Trust. One year thereafter, Armstrong shall receive a payment of one-third of the funds remaining in the Reorganization Trust. One year thereafter, Armstrong shall receive a payment of one-half of the funds remaining in the Reorganization Trust. One year thereafter, Armstrong shall receive a payment of all of the funds remaining in the Reorganization Trust.

If any of the Armstrong Entities shall violate the release and/or injunction set forth in the plan of reorganization at

any time, all of Donald Armstrong's rights to payments from the Reorganization Trust pursuant to this Section I.F. shall be forfeited, and payments to Donald Armstrong, if any, shall be governed by Section I.G. of this Settlement Agreement.

I. G. Use of Reorganization Trust Funds in the Event the Armstrong Entities Violate the Injunction

In the event that any of the Armstrong Entities commences or pursues litigation against the Steppes Parties, Segal, Rushton (or any of those parties' principals, professionals, attorneys, agents, successors-in-interest and assigns) without first obtaining bankruptcy court authority, or in the event that any of the Armstrong Entities violates any other term of the release, the injunction, or the plan of reorganization, the following terms shall govern:

1. All payments to Donald Armstrong from the Reorganization Trust shall be discontinued immediately. No payments shall thereafter be made to Donald Armstrong except as otherwise ordered by the bankruptcy court in accordance with the terms of this Settlement Agreement and the plan of reorganization.

2. The party (or parties) against whom litigation is commenced or pursued shall be entitled to an award of professional fees (including, without limitation, attorneys' fees and accountant fees, as well as expenses and costs) to reimburse them for any professional fees reasonable incurred in defending against any action commenced by Armstrong in violation of the injunction and/or release set forth in this Settlement Agreement and the plan of reorganization confirmed in the Armstrong Case.

Such award shall be payable from the funds remaining in the Armstrong Estate and/or the Reorganization Trust, upon application to the bankruptcy court therefor.

3. Upon application to the Bankruptcy Court, and pursuant to the Bankruptcy Court's discretion, the party (or parties) against whom litigation is commenced or pursued shall be entitled to an award of sanctions arising from each of Donald Armstrong's violations of the injunction. Such sanction award shall be paid from the funds remaining in the Armstrong Estate and/or Reorganization Trust. Such award shall be in addition to the reimbursement of professional fees set forth above. Such sanction award shall be imposed for the purpose of sanctioning Donald Armstrong for violating the injunction, as well as to compensate the party (or parties) against whom litigation is commenced, for the costs, expenses, and damages (including delay, aggravation, and emotional damages) incurred as a result of Donald Armstrong's violation of the injunction.

4. Beginning with administrative type expenses, including expenses awarded under this section of the Settlement Agreement, accrued after the effective date, the payment of awards and reimbursement of professional fees to the Steppes Parties, Segal, Rushton (or any of those parties' principals, professionals, attorneys, agents, successors-in-interest and assigns) from the Reorganization Trust shall be made with equal priority. If there are insufficient funds or property in the Reorganization Trust available to pay all of the pending application for awards and reimbursement, the parties shall share

in the Reorganization Trust on a pro-rata basis based upon the total amounts of their claims.

5. Nothing in this Settlement Agreement shall prevent the Steppes Parties, Segal, or Rushton from pursuing and enforcing any claim, right, sanction, claim for damages, including exemplary damages, or cause of action against Donald Armstrong, individually, arising from Armstrong's violation of the injunction or release except to the extent such claim, right, or cause of action is subject to any automatic stay or discharged pursuant to bankruptcy law.

6. Any and all awards paid to the Steppes Parties, Segal, Rushton (or any of those parties' principals, professionals, attorneys, agents, successors-in-interest and assigns) pursuant to this Settlement Agreement and/or the plan of reorganization shall be payable from and shall reduce the funds in the Reorganization Trust.

7. If Donald Armstrong shall disobey the Bankruptcy Court's injunction, or any other Order of the Court, then the parties hereto may take any and all actions which are deemed necessary or prudent to enforce the injunction, and/or to obtain and maintain compliance with the injunction and/or the Orders of the Court. Such actions may include, but are not necessarily limited to, the following: seeking civil contempt of court remedies against Donald Armstrong; seeking sanctions against Donald Armstrong; and seeking criminal contempt of court sanctions, including the incarceration of Donald Armstrong. The parties hereby agree and stipulate that the reference to the Bankruptcy Court from the United States District Court for the District of Utah may be withdrawn, if

necessary to pursue criminal contempt of court sanctions, including incarceration, against Donald Armstrong. In the event that there are funds remaining in the Reorganization Trust after payment of all awards, fees, and costs to which the Steppes Parties, Segal, Rushton (or any of those parties' principals, professionals, attorneys, agents, successors-in-interest and assigns) may become entitled, payments from the Reorganization Trust may re-commence to Donald Armstrong upon petition by Armstrong to the Bankruptcy Court if, in accordance with such petition, the court finds (1) that Armstrong is in compliance with the injunction, plan of reorganization and releases and is likely to remain in compliance, (2) that the Steppes Parties, Segal, Rushton (or any of those parties' principals, professionals, attorneys, agents, successors-in-interest and assigns) have received the payment of all awards, sanctions, fees, and costs to which they are entitled under this Settlement Agreement and the plan of reorganization; and (3) that all litigation commenced or pursued by Donald Armstrong in violation of the release, the injunction, or the plan of reorganization has been dismissed with no rights of appeal remaining. If the above-cited conditions are met, the bankruptcy court may enter an order for the re-commencement of payments to Donald Armstrong out of the funds, if any, remaining in the Reorganization Trust, as follows: the first payment shall be made one year after the entry of the bankruptcy court's order for the recommencement of payment. The first payment shall be in an amount equal to one-fifth of the funds remaining in the Reorganization Trust. One year thereafter, Donald Armstrong shall receive a payment of one-fourth of the funds remaining in the Reorganization Trust.

One year thereafter, Donald Armstrong shall receive a payment of one-third of the funds remaining in the Reorganization Trust. One year thereafter, Donald Armstrong shall receive a payment of one-half of the funds remaining in the Reorganization Trust. One year thereafter, Donald Armstrong shall receive a payment of all of the funds remaining in the Reorganization Trust. If, at any time after the entry of the bankruptcy court's order for the re-commencement of payments, Donald Armstrong shall again violate any term of the release, the injunction, or the plan of reorganization, then all payments to Donald Armstrong shall immediately cease, and Donald Armstrong shall forfeit any and all rights to further distribution from the Reorganization Trust or the Armstrong Estate. If there are funds available in the Reorganization Trust after Donald Armstrong has forfeited his rights to further distribution, and after payment of all awards and professional fees to which the the Steppes Parties, Segal, Rushton (or any of those parties' principals, professionals, attorneys, agents, successors-in-interest and assigns) may become entitled, then such remaining funds will be disposed of as ordered by the Bankruptcy Court.

I. H. Proposed Abandonment of Certain Rights.

Pursuant to a sale agreement between Rushton and Donald Armstrong approved by the Court in this case, Rushton has residual rights to collect proceeds from certain litigation sold to Donald Armstrong. The parties hereto agree that Rushton may, at his discretion, abandon those residual rights pursuant to a plan of reorganization that Rushton shall have no further responsibility to monitor those rights on behalf of the Armstrong Estate.

If in the course of foreclosing on the Trusts or otherwise succeeding to the Trusts' interest, Rushton shall gain control over certain malpractice claims asserted by the Trusts against attorneys in the state of Texas (the "Malpractice Claims"), then Rushton may, at his option, pursue, settle, and/or sell the Malpractice Claims as may be permitted by Texas law. Any proceeds received by the Armstrong Estate from the Malpractice Claims shall be added to the Reorganization Trust.

Rushton cannot and shall not abandon or assign any claims or cause of action against the Steppes Parties. Rather, as set forth above, any and all such claims and causes of action shall be released in accordance with this Settlement Agreement and the plan of reorganization.

Rushton shall not abandon or assign any rights or claims which the Armstrong Estate has in any entity (including the Trusts, MPV, Wasatch Growth L.L.C., and Summit Growth, Inc.), whether such rights arise as settlor, trustee, beneficiary, shareholder, member, creditor, judgment creditor, successor-in-interest, assignee, or otherwise, until after any and all claims which such entities may have against the Steppes Parties have been finally and irrevocably released.

All other causes of action in the Armstrong Estate may, at Rushton's discretion, be abandoned to Donald Armstrong in accordance with Bankruptcy Code statutes governing abandonment and setting standards for the same. Such abandonment shall not include any cause of action belonging to the Armstrong Estate and settled before the confirmation date.

I. I. <u>Dismissal of the Nondischargeability Action.</u>

Upon the effective date of a Plan of Reorganization in the Armstrong Case incorporating the terms of this Settlement Agreement, Steppes' complaint for nondischargeability against Donald Armstrong in Adversary Proceeding No. 00-2138 shall be dismissed without prejudice -- so long as Donald Armstrong shall not have violated the release and injunction set forth in this Settlement Agreement and so long as Donald Armstrong shall not bring any claim against Steppes or the Steppes Parties in Adversary Proceeding No. 00-2138. If Donald Armstrong violates the release and injunction, and/or if Donald Armstrong pursues any claim against any of the Steppes' Parties in Adversary Proceeding No. 00-2138, then Steppes may, at Steppes' sole discretion, re-open the Adversary Proceeding if allowed by the Bankruptcy Court.

I. J. Stay of Litigation Pending Confirmation of the Plan.

It is the intent and desire of Steppes and Rushton that Adversary Proceeding No. 00-2138 and Adversary Proceeding No. 01-2159 be stayed pending the court's ruling on the confirmation of the plan of reorganization to be filed in accordance with this Settlement Agreement. It is the intent and desire of Steppes and Rushton that, if the bankruptcy court confirms the plan of reorganization to be filed in accordance with this Settlement Agreement, both Adversary Proceeding No. 00-2138 and Adversary Proceeding No. 01-2159 shall be dismissed. As of the signing of this Settlement Agreement, Adversary Proceeding No. 00-2138 and Adversary Proceeding No. 01-2159 have been stayed by the bankruptcy court, based upon the prior memorandum of settlement entered between Steppes and Rushton. Steppes and Rushton desire that the stay remain in effect until the bankruptcy court rules upon the confirmation of the plan of reorganization to be filed in accordance with

this Settlement Agreement. Accordingly, if necessary, Steppes and Rushton shall file motions with the bankruptcy court presiding over the Armstrong Case seeking to stay all pending litigation between Steppes and Rushton, including but not limited to Adversary Proceeding No. 00-2138 and Adversary Proceeding No. 01-2159 until the bankruptcy court's ruling on confirmation of a plan of reorganization.

I. K. Litigation Pending Approval of Settlement Agreement; Support of Award of Administrative Fees.

Steppes and Rushton recognize that Donald Armstrong has commenced litigation in the bankruptcy court and elsewhere which Steppes and Rushton believe to be in violation of the automatic stay, the bankruptcy court's case management order, and the bankruptcy court's orders staying certain adversary proceedings. Such litigation includes, but is not limited to, Adversary Proceeding No. 01-2226 in the United States Bankruptcy Court for the District of Utah and Case No. 010600131 in the Third District Court of Summit County, Utah. Such litigation is a violation because it purports to assert claims which belong to the Armstrong Estate, because it usurps and interferes with the role of Rushton as Chapter 11 trustee, and because it seeks to litigate claims which are at issue in pending adversary proceedings and which have been stayed by the court. If, and to the extent that Donald Armstrong continues to pursue such litigation, and or initiates other improper litigation during the period while this Settlement Agreement is pending approval, Rushton shall presume that such action violates the case management order or the stay orders and shall take action, as appropriate and after consultation with Steppes, to obtain dismissal of such action. Rushton agrees to support a request for administrative fees by the Steppes Parties for any

professional fees which they may be required to expend to defend against such actions during the period before confirmation of a Plan of Reorganization which effectuates this Settlement Agreement. If such litigation, or any other litigation which is in violation of the injunction, remains pending after the Court's approval of this Settlement Agreement and entry of the injunction proposed herein, Armstrong shall be in violation of the injunction, and all of the remedies in Section I.G., above, shall apply.

I. L. Support of the Plan of Reorganization, Minimization of the Costs of Litigation.

The parties hereto acknowledge that there has been extremely voluminous litigation between Steppes and Donald Armstrong and/or entities owned or controlled by Donald Armstrong. Rushton and Steppes acknowledge that they will cooperate in setting forth this history of litigation in a disclosure statement in the Armstrong Chapter 11 case to support the provisions of this Settlement Agreement.

II. SETTLEMENT WITH MPV

II. A. Withdrawal of Steppes' Claim.

Upon approval of this Settlement Agreement by the Bankruptcy Court and/or upon Confirmation of the Plans of Reorganization contemplated by this Settlement Agreement, Steppes' claim in the MPV Estate shall be deemed withdrawn, and the order approving the Settlement Agreement shall so state.

II. B. Subordination and Payment of Rushton's Claim.

Upon approval of this Settlement Agreement by the

Bankruptcy Courts at the time of the Confirmation of the Plan of Reorganization in the Armstrong Chapter 11 case or at such other time as the Bankruptcy Court approves this Settlement Agreement or relevant provisions herein, Rushton shall subordinate any and all claims of Rushton and/or the Armstrong Estate against the MPV Estate to all other allowed claims including administrative, priority, secured and general unsecured claims. After payment of all other allowed claims against the MPV Estate in cash, including administrative, priority, secured and general unsecured and creditor claims, Rushton will be entitled to a distribution of all remaining assets in the MPV Estate. Accordingly, control over the wrongful lien claim asserted against Steppes in Adversary Proceeding No. 99-2218 pending in the MPV Case, as well as any and all other claims which Segal or the MPV Estate may have against the Steppes Parties shall be vested in Rushton as equity holder of MPV. All other assets of the MPV Estate remaining at the time of the distribution under a Plan of Reorganization in the Chapter 11 case of MPV shall be distributed to Rushton, as a subordinated unsecured creditor of MPV or shall remain with Reorganized MPV and be controlled by Rushton as equity holder of MPV. Segal shall not seek to stay or otherwise stop the Court from ruling on the pending Motions for Summary Judgment in Adversary Proceeding No. 99-2218. The parties shall not pursue further litigation in Adversary Proceeding No. 99-2218 prior to Rushton's gaining control over any and all of MPV's claims against the Steppes Parties. Segal shall not dispose of claims against the Steppes Parties except under the terms of the Settlement Agreement. The Parties hereto believe and execute this Settlement Agreement under the belief that there are sufficient assets in the MPV Estate to allow the wrongful lien litigation as well as any other claims the MPV Estate may have against Steppes or the Steppes Parties to be effectively passed to the control of Kenneth A. Rushton as set forth above; any failure of those claims to so

pass shall be deemed a material mistake which shall vitiate, in whole, this Settlement Agreement and all covenants and undertakings hereunder.

II. C. Injunction Against Future Litigation.

The Plan of Reorganization confirmed in the MPV Case shall also include a permanent injunction enjoining Armstrong from commencing or continuing any litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, agents and assigns, (including but not limited to those persons listed in paragraph I.C. of this Stipulation) based upon claims or causes of action released pursuant to the terms of this Settlement Agreement or a Plan of Reorganization which includes the terms of this Settlement Agreement. The Plan of Reorganization shall also contain a permanent injunction barring Armstrong from commencing or continuing causes of action or based upon any action taken by Rushton, Segal, the Steppes Parties, or any of their principals, agents, attorneys, and related parties, in effectuating the settlement and the plan. To assure compliance with the injunction, Segal shall seek a provision in any injunction to be approved as part of a plan of reorganization that Armstrong must apply to the bankruptcy court for authority to commence or continue litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, agents and assigns (including but not limited to those persons listed in paragraph I.C. of this Stipulation). If approved by the bankruptcy court, the injunction shall provide that the bankruptcy court will grant authority to Armstrong to commence a suit against a released party only upon a finding that such litigation does not violate the terms of the Plan of Reorganization confirmed in the MPV Case, including the injunction contained in that Plan.

In the event Armstrong violates the permanent injunction set forth in the Plan of Reorganization confirmed in the MPV Case by commencing or continuing litigation against Steppes, Segal, Rushton or any of those parties, principals, professionals, agents and assigns (including but not limited to those persons listed in paragraph I.C. of this Stipulation) without bankruptcy court authority, and Segal receives reliable information to conclude that a violation of the permanent injunction may have occurred, Segal shall take reasonable actions to seek enforcement of the permanent injunction in the bankruptcy court and the cost of such enforcement, including necessary fees incurred by professionals, shall be considered a cost of administration of the Plan of Reorganization payable from funds remaining in the estate upon application to, and allowance by, the bankruptcy court and/or allowable for payment from the Armstrong Estate under paragraph I.G. of this Settlement Agreement.

III. GENERAL TERMS

III. A. Bankruptcy Court Approval.

The terms of this Settlement Agreement which obligate Rushton are conditioned upon and subject to approval of the United States Bankruptcy Court for the District of Utah presiding over the Armstrong Case and the terms of this Settlement Agreement which obligate Segal are subject to and conditioned upon approval of the United States Bankruptcy Court for the District of Utah presiding over the MPV Case. Approval from either bankruptcy court requires such notice and hearing as is mandated under the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. The parties contemplate that the terms of this Stipulation will ultimately be incorporated into Disclosure Statements and Plans of

Reorganization to be proposed in the MPV and Armstrong Cases and such Disclosure Statement and Plans of Reorganizations are subject to approval and/or confirmation by the bankruptcy court presiding over the respective cases. To facilitate confirmation of a Plan of Reorganization in either case, upon Motion executed by all parties to this Settlement Agreement, portions of this Settlement Agreement may be presented to the bankruptcy court presiding over the Armstrong Case and/or MPV Case for approval under Rule 9019 of the Federal Rules of Bankruptcy Procedure.

III. B. Procedure for Consummating Settlement.

This Settlement Agreement contemplates drafting and proposing Disclosure Statements and Plans of Reorganization incorporating the terms of the Settlement in both the MPV and Armstrong Cases and contemplates confirmation of such Plans of Reorganizations. It is understood that the instant Settlement Agreement does not recite all provisions of a Disclosure Statement or Plan of Reorganization but the parties agree that this Settlement Agreement contains the essential terms of their agreement, and all parties are bound, in good faith, to pursue actions necessary to obtain bankruptcy court approval of this Settlement Agreement including confirmation of Plans of Reorganization consistent with and in furtherance of the terms set forth in this Settlement Agreement. To the extent this Settlement Agreement is approved by the Bankruptcy Court, its terms shall be incorporated by Rushton and Segal in any plan and disclosure statement confirmed in those cases. If this Settlement Agreement is not approved by the applicable bankruptcy courts, Segal and Rushton shall have no duty to pursue Plans of Reorganization based upon this Settlement Agreement. This Settlement Agreement may be filed with the court and shall be considered equivalent, in

effect, to reading a settlement into the court's record as the terms under which the parties intend to proceed in an effort to settle claims and disputes that exist between them. The parties will cooperate and work together in good faith to take the actions necessary as soon as is reasonably practicable to consummate the Settlement Agreement. Toward that end, Rushton and Segal shall each file a Disclosure Statement and Plan of Reorganization in the Case for which they serve as Chapter 11 Trustee (Segal in the MPV Case and Rushton in the Armstrong Case) incorporating the terms of this Settlement Agreement no later than September 28, 2001 (or as otherwise extended by the parties by no more than 60 days by written notice) and shall use reasonable diligence thereafter to obtain confirmation of such Plans of Reorganization as soon as practicable thereafter.

III. C. Representation by Counsel.

Each of the parties to this Settlement Agreement have been represented by independent counsel, or determined, voluntarily, not to consult counsel. Each party has voluntarily entered into the Agreement without any duress or coercion from anyone

III. D. Costs and Attorneys Fees.

Rushton and Steppes agree that they shall not apply in the MPV Case for allowance of fees and costs under Section 503(b)(3) of the Bankruptcy Code. Segal and Steppes agree that they shall not apply in the Armstrong Case for allowance of fees and costs under Section 503(b)(3) of the Bankruptcy Code except as otherwise permitted herein.

III. E. Choice of Law.

This Settlement Agreement shall be deemed to be made and

interpreted under, and the rights and liabilities of the parties hereto and shall be determined in accordance with, the laws of the state of Utah and the United States Bankruptcy Code.

III. F Jurisdiction.

Jurisdiction over any dispute arising under this settlement agreement shall lie only with the United States District Court for the District of Utah, Central Division, as referred to the United States Bankruptcy Court for the District of Utah. Nothing in this Settlement Agreement, however, shall constitute a choice-of-law, or choice-of-forum provision with respect to any litigation between Donald Armstrong and the Steppes Parties. None of the Steppes Parties shall be deemed to be subject to personal jurisdiction in Utah by virtue of Steppes' signing the present Settlement Agreement.

III. G. Scope.

This Settlement Agreement shall constitute the entire agreement among them concerning the subject matters covered herein. There are no representations, warranties, agreements, arrangements or undertakings, written or oral, between or among the parties hereto relating to the subject matter of this Settlement Agreement which are not fully expressed and that all parties, with the advice of their respective counsel, have carefully read the entire foregoing Settlement Agreement and know the contents thereof and sign the same of their own free will. This Agreement supersedes any prior written or oral agreements among the parties.

III. H. Successors and Assigns.

This Settlement Agreement shall be binding upon all parties hereto notwithstanding any assignment of any rights.

Furthermore, the Settlement Agreement shall be binding upon, and inure to the benefit of any and all successors and assigns. Except as expressly permitted herein with respect to abandonment and assignment of claims, there shall be no assignment of any rights or remedies to Donald Armstrong or to any entity owned by, controlled by, or related to Donald Armstrong.

III. I. Amendments, Changes and Modifications.

No amendment, change or modification of this Settlement Agreement shall be valid unless in writing, signed by the parties affected thereby or their respective successors and/or assigns.

III. J. Duplicates and Counterparts.

This Agreement may be signed in duplicate originals and/or in counterparts.

III. K Captions and Headings

The captions and headings in this Settlement Agreement are included for the convenience of the parties and the court and have no legal effect and may not be used to contradict or otherwise interpret the language and provisions of this Settlement Agreement.

DATED: Sept. 7, 2001

KENNETH A. RUSHTON,
Chapter 11 Trustee for the
Estate of Donald E. Armstrong

/s/

DATED: Sept. 7, 2001

ROGER G. SEGAL, Chapter 11 Trustee
for
MOUNTAIN PACIFIC VENTURES, INC.
/s/

DATED: Sept. 7, 2001

STEPPES APARTMENTS, LTD.

By: /s/
John L. Feece
President of its general partner,
Baxter Holdings, Inc.

APPENDIX J

Julie A. Bryan (Bar No. 4805)
COHNE, RAPPAPORT & SEGAL, P.C.
525 East 100 South, 5th Floor
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666
Attorney for Roger G. Segal, Chapter 11 Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
- CENTRAL DIVISION

FILED IN THE
UNITED STATES
BANKRUPTCY COURT
DISTRICT OF UTAH
2001 NOV 20 P 3:09
WILLIAM C. STILLGEBAUER
CLERK OF COURT
BY: DEPUTY CLERK

In re:
MOUNTAIN PACIFIC VENTURES, INC.,
Debtor.

Bankruptcy No. 99C-22588
(Chapter 11)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of November, 2001 a true and accurate copy of the foregoing **Disclosure Statement for Trustee's Chapter 11 Plan of Reorganization** and attached **Trustee's Plan of Reorganization Dated November 15, 2001** was mailed, first class, postage fully prepaid, in the United States mail to the following individuals:

Mountain Pacific Ventures, Inc.
c/o Donald F. Armstrong
P.O. Box 1059
Park City, Utah 84060

Penrod Keith
Leboeuf, Lamb, Greene & Macrae
136 S. Main #1000
Salt Lake City, Utah 84101

Greg Adams
MCKAY, BURTON & THURMAN
600 Gateway Tower East
#10 East South Temple Street
Salt Lake City, Utah 84133

Jeff Shields
Callister Nebeker & McCullough
10 E. So. Temple #900
Salt Lake City, Utah 84133

Securities and Exchange Commission
Attn: Sandra W. Lavigna
5760 Wilshire Blvd, 11th Floor
Los Angeles, CA 90036

/s/ Tauni Lee

Julie A. Bryan (Bar No. 4805)
COHNE, RAPPAPORT & SEGAL, P.C. 525 East 100 South, 5th Floor P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666
Attorney for Roger G. Segal, Chapter 11 Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
- CENTRAL DIVISION

FILED IN THE
UNITED STATES
BANKRUPTCY COURT
DISTRICT OF UTAH
2001 NOV 20 P 3:09
WILLIAM C. STILLGEBAUER
CLERK OF COURT
BY: DEPUTY CLERK

In re:
MOUNTAIN PACIFIC VENTURES, INC.,
Debtor.

Bankruptcy No. 99C-22588
(Chapter 11)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20 day of November, 2001 a true and accurate copy of the foregoing **Disclosure Statement for Trustee's Chapter 11 Plan of Reorganization** and attached **Trustee's Plan of Reorganization Dated November 15, 2001** was mailed, first class, postage fully prepaid, in the United States mail to the following individual:

United States Trustee's Office
Boston Building

9 Exchange Place, Suite 100
Salt Lake City, UT 84101

/s/ Tauni Lee

(2)

No. 04-479

Supreme Court, U.S.
FILED
NOV 2 2 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DONALD E. ARMSTRONG, POST-BANKRUPTCY PETITION AND AS A BENEFICIARY OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST,

Petitioner,

v.

ROGER G. SEGAL, AS TRUSTEE OF BANKRUPTCY ESTATE OF MOUNTAIN PACIFIC VENTURES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

JULIE A. BRYAN
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Attorneys for Respondents Roger G. Segal, former Trustee of the Chapter 11 Bankruptcy Estate of Mountain Pacific Ventures, Inc. and Disbursing Agent Under the MPV Plan

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Is Armstrong's appeal of the Order confirming the Plan of Reorganization in the bankruptcy case of Mountain Pacific Ventures, Inc. ("MPV") moot as a result of the substantial consummation of the Plan, which paid all unsecured creditors, including Armstrong, in full?

(2) Is review of the "litigation injunction" included in the Plan of Reorganization confirmed in MPV's bankruptcy case legally merited where the injunction is at the core of the Plan of Reorganization and reasonably calculated to protect the bankruptcy process?

(3) May Armstrong use appeal from the Order confirming a Plan of Reorganization in the Mountain Pacific Ventures, Inc. bankruptcy case to challenge a final judgment rendered by the Texas state court, *Armstrong v. Steppes Apartments Ltd*, 57 S.W.2d 37 (Tex. App. – July 6, 2001), *rev. denied*, (3 pets) (January 10, 2002), *cert. denied*, 536 U.S. 95, 122 S.Ct. 2645, 153 L.Ed.2d 823 (2002) (the "Texas Modified Judgment").

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS TO DENY THE PETITION	14
1. THE LITIGATION INJUNCTION	17
2. THE TEXAS MODIFIED JUDGMENT	21
3. THE SUZUKI	22
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Rushton, 294 B.R. 344 (BAP 10th Cir. 2003) 8, 18, 21

Armstrong v. Steppes Apartments, Ltd., 57 S.W. 2d 37 (Tex. App. July 6, 2001); 536 U.S. 95, 122 S.Ct. 2645, 153 L.Ed.2d 823 (2002) 21

Feld v. Zale Corporation (In re Zale Corporation), 62 F.3d 746 (5th Cir. 1995) 18

First Union Commercial Corp. v. Nelson, Mullins, Riley & Scarborough (In re Varat Enter., Inc.) 81 F.3d 1310 (4th Cir. 1996) 20

In re Armstrong, 297 B.R. 154 (Bankr. D. Utah 2003) 8, 20

In re Donald E. Armstrong, Bankr. Case No. 00-26592 (Bankr. D. Utah 2000) 12

In re Energy Co-op., 886 F.2d 921 (7th Cir. 1989) 21

In re Greenberg, 266 B.R. 45 (Bankr. E.D.N.Y. 2001) 20

In re GWI PCS 1 Inc., 230 F.3d 788 (5th Cir. 2000) 14

In re Mountain Pacific Ventures, Inc., Bankr. Case No. 99-22588 (Bankr. D. Utah 1999) 12

In re Pritam Realty, Inc., 233 B.R. 619 (D.P.R. 1999) 15

In re Public Service Co. of New Hampshire, 963 F.2d 469 (2nd Cir. 1992) 15

In re Sweetwater, 57 B.R. 743 (D. Utah 1985) 18

Johnson v. Grundy, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) 21

Raskin v. Malloy, 231 B.R. 809 (D.C. N.D. Okla. 1997) 16

TABLE OF AUTHORITIES – Continued

Page

SEC v. Drexel Burnham Lambert Group (In re Drexel Burnham Lambert Group), 960 F.2d 285 (5th Cir. 1992) 18

Tippet v. Umpqua Shopping Center, Inc. (In re Umpqua Shopping Center, Inc.) 111 B.R. 303 (BAP 9th Cir. 1990) 18

STATUTES

11 U.S.C. Section 524 19

STATEMENT OF THE CASE

The Petition for Writ of Certiorari before this Court arises from the Chapter 11 bankruptcy case of Mountain Pacific Ventures, Inc. ("MPV") filed, through Donald E. Armstrong, ("Armstrong"), then MPV's president, in the United States Bankruptcy Court for the District of Utah, case number 99C-22588 (the "MPV Bankruptcy"). Armstrong, however notes, that the matters involved in that bankruptcy stem from litigation between Armstrong and Steppes Apartments Ltd. ("Steppes") in Texas State Court, which resulted in the Texas Modified Judgment, awarding damages against Armstrong in excess of $2 million. (*See Petition for a Writ of Certiorari*, hereinafter cited as "Armstrong's Petition," at p. 18). In fact, the MPV Bankruptcy was filed by Armstrong in part, in order to stay post-judgment litigation against Armstrong and MPV in which Steppes asserted, *inter alia* that Armstrong fraudulently conveyed assets to avoid payment of that judgment. As a result of pre- and post-petition misconduct by Armstrong, Respondent, Roger G. Segal (the "Respondent") was appointed Trustee of the bankruptcy estate of MPV. Steppes filed a proof of claim against MPV's bankruptcy case for assets transferred from Armstrong, including, specifically, an interest in a partnership with a value exceeding $400,000.00. Armstrong, likewise, filed two proofs of claim, totaling $414,615.26 for amounts allegedly loaned by Armstrong to MPV.

The Respondent, acting as Trustee of the MPV bankruptcy estate vigorously pursued claims against Steppes, including, *inter alia* the claim that Steppes had filed a wrongful lien against MPV property. In the meantime, post-judgment litigation between Armstrong and Steppes

continued and, just prior to entry of judgment against Armstrong in that litigation, Armstrong filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Utah, commencing bankruptcy number 00-26592 (the "Armstrong Bankruptcy"). Kenneth A. Rushton ("Rushton") was thereafter appointed Trustee of the Armstrong Bankruptcy. As a matter of law, all property of Armstrong, including claims against MPV, Steppes, all of the stock of MPV (which had been owned, pre-petition, by Armstrong) and the revocable "Trusts" created by Armstrong, became property of Armstrong's bankruptcy estate controlled, not by Armstrong, but by Rushton. After the filing of his own bankruptcy petition, Armstrong acquired (presumably by purchase) claims of other creditors of the MPV estate. Those claims are the only "interest" that he had in MPV's bankruptcy after the filing of his own petition in bankruptcy.

Negotiations commenced between Respondent, Rushton and Steppes to resolve ongoing litigation. Armstrong correctly notes that, during that time, Respondent continued in litigation with Steppes, leading to partial summary judgment by the Bankruptcy Court finding that Steppes had, in fact, filed a wrongful lien against MPV property. However, the question remained – and a venerable question indeed – how much "damage" that lien caused MPV. Indeed, the Bankruptcy Court remarked that, though wrongful, the liens actually *benefitted* MPV by preventing fraudulent conveyance of assets from that estate. *See*

Transcript of Hearing dated May 24, 2001, attached hereto as Appendix 1 at pp. 3a-4a.[1]

Prior to the Bankruptcy Court's ruling on the wrongful lien motion for summary judgment, Segal, Steppes and Rushton entered into negotiations, which culminated in the signing of a Stipulation for Settlement between Steppes, Rushton and Respondent, executed on September 7, 2001 which attached as Appendix "I" to Armstrong's Petition (the "Plan Settlement"). Under the Plan Settlement, both Steppes and Rushton agreed to withdraw all of their claims against the bankruptcy estate of MPV. Rushton, as sole shareholder of MPV, was then to receive the assets remaining in MPV after payment of all unsecured claims. Steppes received no distribution from MPV's bankruptcy estate under the Plan Settlement. Steppes agreed to limit its claim against Armstrong's bankruptcy in a manner which, absent extraordinary litigation expense (which has, in fact ensued in that case) would have left sufficient assets in the estate of Armstrong to pay unsecured creditors, in full, and return substantial assets to Armstrong.

As part of the Plan Settlement, Steppes required some assurance that it would not have to continue to litigate endlessly with Armstrong about the claims, which were property of the bankruptcy estates of MPV and Armstrong, and which were settled by virtue of the Plan Settlement. Accordingly, the Plan Settlement provides:

---

[1] Armstrong's Petition includes part of this Transcript as Appendix "G," but omits parts that do not support his perceptions of the claims against Steppes.

I. D. *Injunction Against Future Litigation.*

The Plan of Reorganization confirmed in the Armstrong Case shall also include a permanent injunction enjoining Armstrong from commencing or continuing any litigation against the Steppes parties . . . Segal, Rushton or any of those parties' principals, professionals, agents and assigns, based upon claims or causes of action released pursuant to the terms of this Settlement Agreement or a Plan of Reorganization which includes the terms of this Settlement Agreement. The Plan of Reorganization shall also contain a permanent injunction barring Armstrong from commencing or continuing causes of action based upon any action taken by Rushton, Segal, the Steppes Parties, or any of their principals, agents, attorneys, and related parties, in effectuating the settlement and the plan. The injunction shall apply to Donald Armstrong, individually, [the Trusts related to Donald E. Armstrong] as well as any entity related to Donald Armstrong and controlled by him in whole or in part or any entity over which Donald Armstrong asserts actual control (the "Armstrong Entities").

To assure compliance with the injunction, Rushton shall seek a provision in any injunction to be approved as part of a plan of reorganization that Donald Armstrong must apply to the bankruptcy court for authority to commence or continue litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, attorneys, agents and assigns. If approved by the bankruptcy court, the injunction shall provide that if Donald Armstrong desires to file or pursue

any claim or litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, attorneys, agents and assigns, Donald Armstrong must first file an application with the bankruptcy court, showing that the desired litigation does not violate the terms of the Plan of Reorganization confirmed in the Armstrong Case, including the release and injunction contained in that Plan. After providing notice and a reasonable opportunity for response by the Steppes Parties, Segal, Rushton (and/or any of those parties' principals, professionals, attorneys, agents and assigns), the bankruptcy court will make a determination whether Donald Armstrong shall be permitted to pursue such claim or litigation. The bankruptcy court will grant authority to Donald Armstrong to commence a suit against a released party only upon a finding that such litigation does not violate the terms of the Plan of Reorganization confirmed in the Armstrong Case, including the release and injunction contained in that Plan. In the event Donald Armstrong files an application with the bankruptcy court under this section, and such application is denied by the Court, then the Steppes Parties, Segal, Rushton (and/or any of those parties' principals, professionals, attorneys, agents and assigns) shall be awarded reimbursement of all attorney's fees and costs reasonably incurred in relation to the application – including fees incurred in responding to the application and in attending any hearing on the matter. Such reimbursement shall be obtained by application to the bankruptcy court, and shall be paid from the assets of the Armstrong Estate and/or the Reorganization Trust described in Section I.E., *infra*. Such reimbursement shall reduce the

amount of funds available for disbursement under the Reorganization Trust (as defined below).

In the event the Armstrong Entities violate the permanent injunction set forth in the Plan of Reorganization confirmed in the Armstrong Case, by commencing or continuing litigation against the Steppes Parties, Segal, Rushton or any of those parties principals, professionals, attorneys, agents and assigns without bankruptcy court authority, or otherwise, and in the event that Rushton receives reliable information to conclude that a suit has been commenced against one of the released parties without Bankruptcy Court authority, Rushton shall take reasonable actions to seek enforcement of the permanent injunction in the bankruptcy court. The reasonable cost of such enforcement, including fees incurred by professionals, shall be considered a cost of administration of the Plan of Reorganization payable from funds remaining in the estate and/or the "Reorganization Trust" upon application to the bankruptcy court, as set forth in Section I.G., *infra*. . . .

II. C. *Injunction Against Future Litigation.*

The Plan of Reorganization confirmed in the MPV Case shall also include a permanent injunction enjoining Armstrong from commencing or continuing any litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, agents and assigns, (including but not limited to those persons listed in paragraph I.C. of this Stipulation) based upon claims or causes of action released pursuant to the terms of this Settlement Agreement or a Plan of Reorganization which includes the terms of this Settlement Agreement. The Plan of Reorganization shall also contain a permanent

injunction barring Armstrong from commencing or continuing causes of action or based upon any action taken by Rushton, Segal, the Steppes Parties, or any of their principals, agents, attorneys, and related parties, in effectuating the settlement and the plan. To assure compliance with the injunction, Segal shall seek a provision in any injunction to be approved as part of a plan of reorganization that Armstrong must apply to the bankruptcy court for authority to commence or continue litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, agents and assigns (including but not limited to those persons listed in paragraph I.C. of this Stipulation). If approved by the bankruptcy court, the injunction shall provide that the bankruptcy court will grant authority to Armstrong to commence a suit against a released party only upon a finding that such litigation does not violate the terms of the Plan of Reorganization confirmed in the MPV Case, including the injunction contained in that Plan.

In the event Armstrong violates the permanent injunction set forth in the Plan of Reorganization confirmed in the MPV Case by commencing or continuing litigation against Steppes, Segal, Rushton or any of those parties, principals, professionals, agents and assigns (including but not limited to those persons listed in paragraph I.C. of this Stipulation) without bankruptcy court authority, and Segal receives reliable information to conclude that a violation of the permanent injunction may have occurred, Segal shall take reasonable actions to seek enforcement of the permanent injunction in the bankruptcy court and the cost of such enforcement, including necessary fees incurred by professionals, shall be

> considered a cost of administration of the Plan of Reorganization payable from funds remaining in the estate upon application to, and allowance by, the bankruptcy court and/or allowable for payment from the Armstrong Estate under paragraph I.G. of this Settlement Agreement.

The Plan Settlement was incorporated into a Plan of Reorganization (the "Armstrong Plan") in the Armstrong bankruptcy and that Plan was confirmed, after contested hearing, on January 31, 2002. A copy of the Order confirming the Armstrong Plan (the "Armstrong Confirmation Order") is attached hereto as Appendix 2. The Order was not timely appealed. *Armstrong v. Rushton*, 294 B.R. 344, 355 (BAP 10th Cir. 2003).[2] Accordingly, under the Armstrong Confirmation Order:

> Donald E. Armstrong, the Donald E. Armstrong Family Trust, the Donald E. Armstrong Charitable Remainder Unitrust, and any other entity related to the Debtor and controlled by him in whole or in part, . . . are . . . enjoined from commencing or continuing any litigation against Steppes Apartments Ltd., Rushton, Segal, and

---

[2] The Bankruptcy Appellate Panel's decision in *Armstrong v. Rushton* is instructive on virtually all of the legal arguments raised in Armstrong's Petition. Indeed, similar arguments have been raised by Armstrong in numerous cases, in several different courts and jurisdictions. *See In re Armstrong*, 297 B.R. 154, 159 (Bankr. D. Utah 2003), *aff'd*, 309 B.R. 799 (BAP 10th Cir. 2004)(outlining litigation that has been pursued by Armstrong). Thus, Armstrong's position that he has been denied access to any court is simply not accurate. An accurate statement is that Armstrong's arguments have not prevailed in the courts. While that is, perhaps, frustrating to Armstrong, the failure of the courts to agree with a litigant's position is not a constitutional denial of access to the courts.

any of those parties' principals, professionals, agents, and assigns based upon (1) claims or causes of action released pursuant to the terms of this Plan and the Steppes/Rushton/Segal Settlement and (2) claims or causes of action based upon action taken by Rushton, Segal, Steppes and any of those parties' principals, professionals, agents, and assigns in effectuating the Steppes/Rushton/Segal Settlement and this Plan. Armstrong must apply to the Court for authority to commence or continue litigation against any of these parties or their principals, professionals, agents, or assigns and the Court will grant such authority only upon a finding that such litigation does not violate the terms of this Plan, including the Litigation Injunction.

In the event Armstrong violates the permanent injunction set forth in the Plan of Reorganization confirmed in the MPV Case by commencing or continuing litigation against Steppes, Segal, Rushton or any of those parties principals, professionals, agents and assigns without bankruptcy court authority, and Segal receives reliable information to conclude that a violation of the permanent injunction may have occurred, Segal shall take reasonable actions to seek enforcement of the permanent injunction in the bankruptcy court and the cost of such enforcement, including necessary fees incurred by professionals, shall be considered a cost of administration of the Plan of Reorganization payable from funds remaining in the estate upon application to, and allowance by, the bankruptcy court and/or allowable for payment from the Armstrong Estate under paragraph I.G. of the Steppes/Rushton/Segal Settlement.

(Hereinafter referred to as the "Armstrong Litigation Injunction"). *See Armstrong Confirmation Order* attached hereto as Appendix 2 at pp. 32a-33a.

The Armstrong Confirmation Order also provides, *inter alia,* that the assets and operative control of the Family Trust and the Donald E. Armstrong Charitable Unitrust (the "Trusts") were property of the Armstrong bankruptcy estate – and are to be turned over to Rushton (and provides that Rushton will dissolve the Family Trust). *See Armstrong Confirmation Order* attached hereto as Appendix 2 at pp. 27a-30a.

The Plan Settlement was incorporated into a Plan of Reorganization filed in MPV's case, (the "MPV Plan"). The MPV Plan, a Disclosure Statement, a Notice of Hearing and, where appropriate, ballots, were circulated to all parties in interest. Armstrong cast ballots for each of the claims that he acquired. The class of general unsecured creditors under the MPV Plan was unimpaired. They were to be, and have been, paid in full, with interest. Therefore, the vote of the unsecured class was irrelevant to MPV Plan confirmation. Nonetheless, for informational purposes, the votes cast by unsecured creditors were provided to the bankruptcy court. The *only* unsecured votes cast against the MPV Plan were those cast by Armstrong for the claims that he purchased. All other unsecured creditors voted for the Plan. Therefore, even with Armstrong's votes against the MPV Plan, the votes cast included more than half in number and two-thirds in amount of votes cast. *See MPV Confirmation Order* attached as Appendix C to Armstrong's Petition at appendix p.11(a).

In accord with the Plan Settlement, Steppes was treated under the MPV Plan as if it had no claim against

the estate of MPV and its claim was unimpaired. *Steppes received no distribution under the MPV Plan and waived its claim against the estate of MPV as part of the Plan Settlement.* The only impaired claims under the MPV Plan were the claims filed against the bankruptcy estate by Armstrong, which had vested in Rushton as Trustee of the Armstrong bankruptcy. Rushton agreed to waive those claims and accept distribution as a shareholder. Rushton voted for confirmation of the Plan.

As for the 1993 Suzuki, in the Statements and Schedules filed in MPV's case and signed by Armstrong, Transwest Credit Union ("Transwest") was listed as an oversecured creditor, with a claim of $7,315.90 secured by a 1993 Suzuki (the "Suzuki"), owned by MPV with a value of $8,000.00. No unsecured claim (indeed, no proof of claim at all) was filed by Transwest prior to confirmation. The Suzuki remained in Armstrong's possession for Armstrong's use. MPV did not use or have possession of the Suzuki, and Armstrong never paid MPV for the use of the Suzuki. Armstrong, not MPV, was the obligor on the loan to Transwest. *See Order*, attached hereto as Appendix "3" at p. 31a. The MPV Plan as proposed at the time of the confirmation hearing provided that the Suzuki would be abandoned by the estate in satisfaction of Transwest's claim. The Court held that Transwest's claim was unimpaired if the Plan was modified to provide that: (a) the Suzuki was to be retained by Armstrong in satisfaction of the claim or sold within 60 days of the confirmation, leaving Armstrong to file a proof of claim for any deficiency; (b) the Trustee had the ability to object to allowance of that proof of claim, but likewise, was obligated to pay the claim, if allowed. The Order confirming the MPV Plan (the "MPV Confirmation Order") provided for that

treatment of the Transwest claim. *See MPV Confirmation Order* attached as Appendix "C" to Armstrong's Petition at pp. 9(a) and 12(a). Armstrong did not surrender the Suzuki, but he has continued to request that the Bankruptcy Court allow him to keep the car *and* get paid as an unsecured creditor in MPV's Bankruptcy, which request the Bankruptcy Court has declined to accommodate. *See Order* attached hereto as Appendix "3."

The MPV Confirmation Order also mirrors the Armstrong Confirmation Order, in that it provides:

> *Litigation Injunction*. Armstrong, the Donald E. Armstrong Family Trust, the Donald E. Armstrong Charitable Remainder Unitrust, and any other entity related to Armstrong and controlled by him in whole or in part, now or in the future, and any other entity over which Armstrong asserts actual control in whole or in part, now and in the future, their agents, attorneys and those acting in concert with them, are hereby permanently enjoined from commencing or continuing any litigation against Steppes Apartments, Ltd. ("Steppes"), . . . and any and all other attorneys of Steppes and their law firms and all employees of such firms, Roger G. Segal as trustee in *In re Mountain Pacific Ventures, Inc.*, Bankr. Case No. 99-22588, Kenneth A. Rushton, ("Rushton") Trustee in *In re Donald E. Armstrong*, Bankr. Case No. 00-26592, and those parties' principals, professionals, agents, and assigns based upon (1) claims or causes of action released pursuant to the terms of the Plan and the Settlement Agreement, and (2) claims or causes of action based upon action taken by the Trustees, the Steppes Parties (all as defined in the Settlement Agreement) and any of those parties'

> principals, professionals, agents, and assigns in effectuating the Settlement Agreement and the Plan. *See also* Fed. R. Bankr. P. 3016(c)(2002).
>
> Armstrong must apply to this Court for authority to commence litigation against any of these parties or their principals, professionals, agents, or assigns, must show that the proposed litigation does not violate the terms of this Plan, and must provide reasonable notice and opportunity to respond to the party against whom Armstrong wishes to proceed. The Court will grant such authority only upon a finding that such litigation does not violate the terms of this Plan, and this Litigation Injunction. If Armstrong applies to the Court to pursue such litigation and his application is denied, then the party or parties responding to the application shall be awarded reimbursement of attorneys' fees and costs reasonably incurred in connection with the application, which the Court, in its discretion, may assess against Armstrong and/or which may be paid from funds remaining in the estate or from the Armstrong Estate under Paragraph 1.9 of the Settlement Agreement.

(Hereinafter referred to as the "MPV Litigation Injunction.")

A notice that the MPV Plan was to become effective was filed and served on or about July 15, 2002. By checks mailed or otherwise delivered on July 29, 2002, the Trustee paid unsecured claims, in full, with interest. Armstrong negotiated five (5) checks, totaling in excess of $20,000, paid to Armstrong on the unsecured claims that Armstrong purchased in the MPV Bankruptcy.

Under the MPV Plan, Rushton has received the stock in MPV and is now the sole shareholder and director of MPV. Rushton has been substituted as plaintiff in the "wrongful lien" litigation pursued by Respondent against Steppes, and has dismissed that adversary proceeding, with prejudice. *See Order Approving the Stipulated Motion of Kenneth A. Rushton, Chapter 11 Trustee, Chapter 11 Trustee of the Estate of Donald E. Armstrong to Dismiss This Litigation*, attached hereto as Appendix "4."

REASONS TO DENY THE PETITION

Armstrong's Petition does little to dispute the premise upon which his appeal of the MPV Confirmation Order was dismissed as moot. Specifically, the United States District Court for the District of Utah held that the Plan of Reorganization confirmed in the MPV case has been substantially consummated and it is "neither reasonable, equitable nor possible to unravel what has been accomplished under the terms of the Confirmed Plan." (*See Order* attached as Appendix B to Armstrong's Petition at p. 5a). Indeed, that is the case. There is "a point beyond which [appellate courts] cannot order fundamental changes in [the] reorganization" process. *In re GWI PCS 1 Inc.*, 230 F.3d 788, 799 (5th Cir. 2000). This recognition has given rise to the doctrine of "equitable mootness," under which an appellate court may decline to consider an appeal "when there has been substantial consummation of the plan so that effective judicial relief is no longer available." *Id* at 799-800. The doctrine of equitable mootness:

> centers on the important public policy favoring orderly reorganization and settlement of debtor estates by affording finality to the judgments of

> the bankruptcy court. . . . [I]n absence of a stay, interested parties are free to implement the confirmed reorganization plan according to its terms, and the consequences may moot the matter in dispute. . . . [T]he case is moot if the requested relief would be either inequitable or impractical in light of the change in circumstances.

In re Pritam Realty, Inc., 233 B.R. 619, 624 (D. P.R. 1999) *quoting In re Public Service Co. of New Hampshire*, 963 F.2d 469, 471-473 (2nd Cir. 1992). In this case, in accord with the terms of the MPV Plan all creditors, including Armstrong, have been paid in full. The reorganized debtor is now out of bankruptcy and is wholly owned by Rushton. Virtually every task under the MPV Plan is complete and it is beyond reasonable question that the MPV Plan has been substantially consummated.

Indeed, Armstrong has taken the untenable position of appealing the Order confirming the MPV Plan – notwithstanding the fact that he enjoyed the benefits of the Plan in the form of payment of claims owned by Armstrong, in full, with interest. Armstrong argues that the Respondent could have paid all such "legitimate" creditors in this bankruptcy case, in full, on September 7, 2001, without the MPV Plan and the Plan Settlement and infers that creditors (including Armstrong) may keep their distributions even if the MPV Confirmation Order is reversed. That argument is spurious. Without the Plan Settlement, payment of all unsecured claims was impossible, regardless of the status Steppes' claim, because Armstrong himself filed a Proof of Claim against the estate of MPV in the amount in excess of $400,000.00. These claims were owned by Rushton as a result of the filing of Armstrong's bankruptcy case. Absent the Plan Settlement, there was

not enough money to pay the claims held by Rushton and other unsecured creditors – excluding Steppes. If Armstrong is inferring that the claims held by Rushton were not "legitimate" he should think long and hard about the assertion as HE FILED the claims.

The fact is, at this stage, there is no realistic way to unwind the MPV Plan or the Plan Settlement underlying the MPV Plan in the event that the MPV Confirmation Order is reversed. Such a reversal would raise a quagmire of unanswerable questions: Must suit be commenced against all creditors to recover funds distributed to them under the MPV Plan? If so, what is the legal basis for recovering payments made to creditors who were, in fact, owed the money they were paid and were entitled to such payment pursuant to the Plan? What happens if creditors are financially unable to pay back funds? At this stage, trying to unwind the consummated Plan would be the equivalent of attempting to "unscramble an egg," *see Raskin v. Malloy*, 231 B.R. 809, 813 (D.C. N.D. Okla. 1997), and would adversely effect the interests of innocent creditors who waited for years for distribution from MPV's bankruptcy estate.[3]

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[3] Armstrong's Petition devotes an entire segment to inferring that, because the fraudulent conveyance actions against Armstrong and other litigation commenced by Steppes (which has not been identified by Armstrong) were voluntarily dismissed, without prejudice, appeal of the MPV Confirmation Order is not moot. *See Armstrong's Petition* at pp. 17-18. That argument is a tempest in a teapot. The claims giving rise to those action are released under the Plan Settlement and subsequent Plans of Reorganizations confirmed in the MPV Bankruptcy and the Armstrong Bankruptcy. Any attempt to revive them outside of the context of the Plan Settlement will meet strong resistance from Respondent and from Rushton so long as the confirmations of the MPV Plan and the Armstrong Plan remain intact. Certainly, the dismissal of

(Continued on following page)

Avoiding that topic, entirely, Armstrong's petition asks this Court to address specific issues as if they can be examined in a vacuum. Respondent replies to those selected issues as follows:

1. THE LITIGATION INJUNCTION

Armstrong infers that this Court can (or should) reverse only that part of the MPV Confirmation Order that contains the MPV Litigation Injunction – leaving the rest in place.

In the first instance, it should be noted that such a ruling would have no effect at all on Armstrong's ability to continue litigation against Steppes, Segal or Rushton. The MPV Litigation Injunction simply mirrors the Armstrong Litigation Injunction, which is, and will remain, in place as the Armstrong Confirmation Order that includes that injunction was not timely appealed.

Moreover, segregating the MPV Litigation Injunction from the rest of the MPV Plan confirmed in the MPV Bankruptcy is not a realistic possibility. The MPV Litigation Injunction was an integral part of the Plan Settlement and is part of the consideration that Steppes and Rushton bargained for when agreeing to withdraw and subordinate (respectively) their claims in order to allow payment of other unsecured claimants. It is simply not possible for this Court to selectively enforce the benefits of the Plan Settlement for the bankruptcy estate of MPV

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litigation post-confirmation of the MPV Plan contributed to the mooting of Armstrong's appeal. However, the core of the mootness argument is that *creditors have been paid* with the money available by virtue of the Plan Settlement and that action simply cannot be reversed.

(that is the subordination and withdrawal of claims) while denying Steppes and Rushton the benefits they obtained under that Settlement. It is well established that a creditor (which is exactly the position that Armstrong holds in relation to MPV's bankruptcy case) may be enjoined by a bankruptcy court where such an injunction is central to a Plan of Reorganization. *See, e.g., SEC v. Drexel Burnham Lambert Group (In re Drexel Burnham Lambert Group)*, 960 F.2d 285, 293 (5th Cir. 1992). In this case, the Plan Settlement was the core of the MPV Plan without the Plan Settlement whether or when creditors would get paid was deeply in question. With it, all creditors were paid in full and assets were returned to the shareholder.

To circumvent this reality Armstrong relies upon authorities such as *Feld v. Zale Corporation (In re Zale Corporation)*, 62 F.3d 746, 756-57 (5th Cir. 1995), which held that a bankruptcy court has no jurisdiction to enjoin third parties from pursuing litigation When the litigation is not property of the bankruptcy estate or does not effect the estate. Such precedent has no bearing on the case at bar. In this case, the Plan Settlement settles *only* claims that are property of the MPV Bankruptcy estate, claims that are property of the Armstrong Bankruptcy estate (including the claims of Trusts against Steppes, as those claims are also property of the Armstrong Bankruptcy estate[4]) and claims

[4] Armstrong argues that the Trusts rights were impaired without notice to the beneficiaries. Armstrong Petition at p. 13. As noted by the Bankruptcy Appellate Panel for the Tenth Circuit, Armstrong has no standing to invoke the rights of any third parties – including alleged beneficiaries of the Trusts. *Armstrong v. Rushton (In re Armstrong)*, 294 B.R. 344, 359 (BAP 10th Cir. 2003). Indeed, no party has standing to challenge confirmation of a Plan of Reorganization based upon alleged harms to third parties. *In re Sweetwater*, 57 B.R. 743, 746-77 (D. Utah 1985) *accord Tippet v. Umpqua Shopping Center, Inc. (In re Umpqua*

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held by Steppes against the bankruptcy estates. Those claims include the claims arising from the Texas Modified Judgment,[5] the fraudulent conveyance actions commenced by Steppes against MPV and Armstrong (pre-petition), the wrongful lien claim that the MPV Bankruptcy estate held against Steppes and the claims that Rushton, as successor to Armstrong, asserted against MPV. None of those claims is an independent claim that belongs, in any fashion, to Armstrong. No party who was a stranger to the bankruptcy estate or the settlement is released under the Plan Settlement.[6] As a matter of law, third parties are not allowed

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Shopping Center, Inc)., 111 B.R. 303, 305 (BAP 9th Cir. 1990). Moreover, prior to the Armstrong Confirmation Order, Armstrong claimed to be Trustee of the Trusts and had notice of the confirmation proceeding. *Id.* After the Armstrong Plan was confirmed, the interest of Armstrong in the Trusts was vested in Rushton, who not only had notice of the MPV Plan, he voted for confirmation of that Plan.

[5] Inexplicably, Armstrong argues that Steppes can pursue the Texas Modified Judgment against Armstrong. *Armstrong's Petition* at p. 13. That is not correct. Armstrong's discharge is intact and, accordingly, while the Plan Settlement and the MPV Plan do not void the Texas Modified Judgment, Steppes is enjoined, under 11 U.S.C. Section 524 from pursuing that judgment against Armstrong. Unless and until the bankruptcy court determines that Armstrong's post-confirmation conduct gives rise to further litigation, that injunction remains in place. The court presiding over MPV's bankruptcy case has no jurisdiction over that discharge and MPV's bankruptcy case cannot and will not be the venue for further litigation over that matter, which will rest with the bankruptcy court presiding over Armstrong's Bankruptcy – governed by the Armstrong Confirmation Order.

[6] For the record, Armstrong has already sued Respondent and Respondent's counsel (as well as multiple professionals involved in the Armstrong Bankruptcy). In fact, such actions are, likewise, property of the estate and, even prior to the MPV Litigation Injunction, Armstrong could not, unilaterally – and without relief from the automatic stay, pursue such actions. For that reason (and because Armstrong could not articulate a valid cause of action against the Respondent or his counsel)

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to assert claims that are property of a bankruptcy estate. *See In re Greenberg*, 266 B.R. 45, 47 (Bankr. E.D.N.Y. 2001). Moreover, "[o]nce a plan is confirmed neither a debtor nor a creditor can assert rights inconsistent with its provisions." *First Union Commercial Corp. v. Nelson, Mullins, Riley & Scarborough* (*In re Varat Enter., Inc.*, 81 F.3d 1310, 1317 (4th Cir. 1996). Thus, the MPV Litigation Injunction, for the most part, simply recited a legal axiom: Neither Armstrong nor any entity may litigate claims that were resolved under the Plan.

Unfortunately, Armstrong has, historically, been unable to distinguish between the claims held by the bankruptcy estates of MPV and Armstrong and his own claims and he continues, largely, to pursue multiple litigation efforts in an attempt to attack the Texas Modified Judgment. *See In re Armstrong*, 309 B.R. at 807. Noticeably absent from Armstrong's Petition is any reference to any independent claim held by Armstrong that he would like to litigate. The *only* part of the MPV Litigation Injunction that extends beyond a simple recitation of existing law is the language that required Armstrong to seek bankruptcy court authority before filing any action against the parties to the Plan Settlement. Thus, there is no absolute injunction in the MPV Plan that prevents Armstrong from pursuing his own claims. The MPV Litigation Injunction simply provides a mechanism whereby, if Armstrong has independent claims against any parties to the Plan Settlement, he is entitled to secure authority to bring them, while protecting the MPV Plan and the Armstrong Plan from being

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Armstrong's suits against Respondent and his counsel was dismissed. *See Order* attached hereto as Appendix "5."

undermined by Armstrong's perpetual inclination to litigate regarding the claims that were settled by confirmation of those Plans. Orders such as the MPV Litigation Injunction that are required to protect the integrity of the estate are permitted under the Bankruptcy Code. *In re Energy Co-op.* 886 F.2d 921, 930 (7th Cir. 1989).

2. THE TEXAS MODIFIED JUDGMENT

Armstrong's Petition contains an extensive lament about the injustice of the Texas Modified Judgment. (Armstrong's Petition at pp. 18-23). In fact, the Texas Modified Judgment has already been litigated through all possible channels. It was appealed to the Texas Court of Appeals. Three Petitions for review were filed with the Texas Supreme Court. A Petition for Writ of Certiorari was filed with, and denied by, this Court. *Armstrong v. Steppes Apartments Ltd.*, 57 S.W.2d 37 (Tex. App. – July 6, 2001), *rev. denied,* (3 pets) (January 10, 2002), *cert. denied,* 536 U.S. 95, 122 S.Ct. 2645, 153 L.Ed.2d 823 (2002). The bankruptcy court simply did not provide a venue for further review of the Texas Modified Judgment. In fact, as pointed out by the Bankruptcy Appellate Panel for the Tenth Circuit, the *Rooker-Feldman* doctrine, which prohibits a federal court from acting as an appellate court on a state court judgment – even when the losing party asserts that the state court violated the loser's federal rights, barred such a review. *Armstrong v. Rushton* 294 B.R. 344, 357 and n. 13, *quoting Johnson v. Grundy*, 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). When entering into the Plan Settlement, Respondent recognized that law and, frankly, considered the possibilities of litigation approaches that might make an exception for the circumstances of the MPV Bankruptcy. When the Plan

Settlement reached the point that it gave rise to Steppes withdrawing its claim against the MPV estate, provided payment for all MPV's creditors and was supported by Rushton as MPV's sole shareholder (Rushton), the risk of creative litigation to overcome well-established law was neither reasonable nor wise for the bankruptcy estate. There is no injustice, therefore, in the fact that the MPV Plan was confirmed, whether or not the Texas Modified Judgment was, in Armstrong's opinion, a violation of his rights under the Eighth Amendment to the United States Constitution.

3. THE SUZUKI

Armstrong's claims regarding the Suzuki are far from fodder for derailing confirmation of the MPV Plan nor do they merit consideration, by certiorari, in this Court. Armstrong must re-invent history even to advance an argument. The truth regarding the Transwest claim is as follows: Transwest was listed by Armstrong as an oversecured creditor, with a claim of $7,315.90 secured by the Suzuki owned by MPV with a value of $8,000.00. No unsecured claim (indeed, no proof of claim at all) was filed by Transwest. The Suzuki has remained in Armstrong's possession for Armstrong's use because the Respondent Trustee did not want to leave Armstrong without a vehicle and it did not appear necessary to liquidate that collateral to pay claims of creditors. MPV did not use or have possession of the Suzuki and Armstrong never paid MPV for the use of the Suzuki. Armstrong, (and accordingly Armstrong's bankruptcy estate) not MPV, was the obligor on the loan to Transwest.

Armstrong purchased the claim of Transwest and asserted, at the time of confirmation of the MPV Plan that

he wanted MPV to pay him the value of the Suzuki at the time the bankruptcy was filed – plus interest *and* he wants to keep the car-making himself into a hybrid "secured and unsecured" creditor – though no debt was owed by the estate. To resolve the issue, the MPV Confirmation Order in this case directed Armstrong to turn the Suzuki over to the Respondent for sale, within 60 days of the entry of the Confirmation Order and directed the Respondent to sell the vehicle and turn the proceeds over to the holder of the Transwest claim (as the Suzuki was collateral for the Transwest loan). *See MPV Confirmation Order* at Appendix "C" to Armstrong's Petition, at p. 9(a). The MPV Confirmation Order then provides that the holder of the Transwest claim could file an unsecured claim for any deficiency – and gave the Respondent an opportunity to object to that claim. Any allowed claim ultimately allowed was to be paid in full. *See MPV Confirmation Order* at Appendix "C" to Armstrong's Petition, at p. 9(a). In the alternative, the MPV Confirmation Order provides that the Suzuki could be retained by the holder of the Transwest claim, in full satisfaction of its claim. *See MPV Confirmation Order* at Appendix "C" to Armstrong's Petition, appendix p. 9(a).

The Suzuki was not turned over for sale. No unsecured claim was filed to which the Trustee could object and that, simply is the end. With that, the Bankruptcy Court held that the Transwest claim had been satisfied by surrender of the collateral. *See Order* attached hereto as Appendix "3." Armstrong is upset that he did not manage to keep the car and find a way to make MPV to pay him for the obligation secured by the car – which was an obligation actually owed by the Armstrong Bankruptcy estate. Armstrong's complaint is shallow and provides no

grounds for overturning confirmation of the MPV Plan which provided payment of all allowed unsecured claims, in full (with interest). It should be noted that Armstrong himself received and accepted over $20,000.00 in distributions on unsecured claims he purchased, post-petition, from creditors of MPV. He did not return those funds nor complain that he was not entitled to distribution as the MPV Plan should not have been confirmed. He has not tendered the money back to the MPV Bankrutpcy estate or offered alternate realistic mechanisms for paying all other creditors that were paid. Armstrong simply wants litigation to continue, ad nauseam. It should not. The MPV Plan was confirmed and has been consummated. Accordingly, the United States District Court for the District of Utah and the United States Court of Appeals for the Tenth Circuit, in turn, correctly held that Armstrong's appeal from the MPV Confirmation Order was moot.

CONCLUSION

Based upon the forgoing points and authorities, Respondent respectfully requests the Armstrong's Petition for Writ of Certiorari be denied.

Respectfully submitted,

JULIE A. BRYAN
Counsel for Roger G. Segal, former Trustee of the Chapter 11 Bankruptcy Estate of Mountain Pacific Ventures, Inc. and Disbursing Agent Under the MPV Plan

APPENDIX

TABLE OF CONTENTS FOR APPENDIX

APP. #	DESCRIPTION	PAGE #
1	Hearing Transcript dated May 24, 2001 Adv. Pro. 99-2218	2a
2	Order in Case No. 00-26592 entered January 31, 2002	6a
3	Order re: Transwest Credit Union	37a
4	Order of Dismissal	41a
5	Order re: Amended Motion to Dismiss	44a

APPENDIX 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

* * *

In re:	)	
	)	
MOUNTAIN PACIFIC VENTURES, INC.,	)	Case No. 99-22588
	)	
Debtor.	)	
MOUNTAIN PACIFIC VENTURES,	)	
	)	
Plaintiff,	)	
	)	Case No. 99-2218
vs.	)	
	)	
STEPPES APARTMENTS, LTD.,	)	
	)	
Defendant.	)	

* * *

BEFORE THE HONORABLE GLEN E. CLARK

Thursday, May 24, 2001

1:30 P.M.

CROSS MOTIONS FOR SUMMARY JUDGMENT

ALPHA COURT REPORTING
SERVICE
P.O. Box 510047
Salt Lake City, Utah 84151
(801) 532-5645 Fax 595-8910

Reported By:
Pam Smith, CSR, RMR
File No. 52401

* * *

[29] of this property.

THE COURT: I agree with that.

MR. JEFFREY L. SHIELDS: That has a very good reason, Your Honor. If Mr. Armstrong had continued to be able to convey property with our claim pending and them not having notice of that they would have been the BFP.

THE COURT: And very possibly your lis pendens whether wrongful or not, and particularly if wrongful, benefited Mountain Pacific ventures because it kept Mr. Armstrong from transferring it elsewhere.

I think that's an argument that you're going to make, and I – I'm not sure from your briefs – I know you both cite Winters versus Schulman but – and this isn't a damage phase anyway, but I think you ought to be aware of the Utah Court of Appeals April 5th decision in that case with respect to damages. It's – I'm just telling you that. You and everyone else that, so you know. It seems very limiting to me.

MR. JEFFREY L. SHIELDS: Okay. Your Honor, do you have any other questions or –

THE COURT: No. I think I've gone through what I was thinking on that particular issue.

MR. JEFFREY L. SHIELDS: Why don't I just stay on the issue. I was going to present that at the end but I think it makes sense for me to finish my argument on that

* * *

[67] fear.

MS. BRYAN: I'll try to hit the high points, Your Honor, and there is – there are a lot of matters addressed here and I trust Your Honor – Your Honor's trusty assistant to thoroughly review it and understand it. I've never seen you to do otherwise, so bear with me if I miss something.

In the Schulman action addressing the wrongful lien claim there – Mr. Shields has distinguished that case on the basis that there was no pending action. I would note for this court that in fact in Schulman there was a pending divorce action on appeal and the Schulman court specifically noted that even were that considered a pending action the lis pendens did not affect rightful title to property and therefore was a wrongful lien. So that distinction simply does not fly.

At the same time Schulman noted that creative pleading does not change the nature of an action to collect a money judgement. Doesn't matter what it is characterized at to the extent that it is a money – an action to collect a money judgment, a rose by any other name is just that.

THE COURT: You know how much money the ultimate victim of the wrongful lis pendens in Schulman got?

MS. BRYAN: You know, I do not know the answer to that.

[68] THE COURT: That's why I didn't think either of you understood when I said there's a new Schulman case. The victim of the wrongful lis pendens got one thousand dollars.

MS. BRYAN: And I understand, Your Honor, that damages is wholly another issue. And has been of some concern.

THE COURT: As practical people we need to think about that.

MS. BRYAN: And we have thought about it at some great length. The legal issue is what we're trying to get at.

Let's see. The repetitive comments of Mr. Shields that the lis pendens should attach to, quote, unquote, other property transferred to MPV and the reference to $500,000 that was used, I would ask the court to look at paragraph 71 of Steppes' objection to the motion for summary judgment in this case which says upon information and belief. We think some of that money may have gone to MPV. Way too late in this proceeding for upon information and belief.

It was incumbent upon Mr. – upon Steppes to understand what it was trying to attach or obtain a – and the correct language under the Utah statute is not lien, it's encumbrance, lien or encumbrance. Before Steppes encumbered property it was to identify it and note that it claimed an interest in that property. There hasn't been or wasn't such

* * *

APPENDIX 2

IN THE UNITED STATES BANKRUPTCY COURT DISTRICT OF UTAH, CENTRAL DIVISION

In re: **DONALD E. ARMSTRONG,** Debtor SSN: 308-56-3353	Bankruptcy No. 00-26592-JAB (Chapter 11) Honorable Judith A. Boulden

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DATED JANUARY 31. 2002. CONFIRMING AND APPROVING TRUSTEE'S SECOND REVISED PLAN OF REORGANIZATION DATED NOVEMBER 19, 2001 [Docket no. 573] AND GRANTING RELATED MOTIONS [Docket nos. 612, 613, and 695]

The Trustee's Second Revised Plan of Reorganization Dated November 19, 2001 (the "Plan")[1] filed under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, et seq., was filed by Kenneth A. Rushton, Chapter 11 trustee in this case (the "Trustee"). Following the Court's approval of the Disclosure Statement for the Trustee's Second Revised Plan of Reorganization Dated November 19, 2001 (the "Disclosure Statement") by Order entered November 20, 2001, the Disclosure Statement, Plan, notice of hearing and, where appropriate, a ballot, were transmitted to

[1] Capitalized terms in this Order will have the meaning assigned to them in the Plan unless otherwise noted.

creditors and Donald E. Armstrong, the debtor ("Armstrong" or the "Debtor"). Hearings were held on December 20, and 21, 2001, and on January 4, 11, 14, 15, 17, and 23, 2002 to consider confirmation of the Plan and the following related motions: Motion for Temporary Allowance of Claim filed by Steppes Apartments, Ltd. [docket no. 606] (the "Steppes Temporary Allowance Motion"); Motion for Estimation of Claim Number 1, Claim of Steven R. Bailey, Trustee of Willow Brook Cottages, L.L.C. [docket no. 648] (the "Willow Brook Estimation Motion"); Trustee's Motion dated December 18, 2001, Pursuant to 11 U.S.C. § 1126(e) for Designation of: (1) Donald E. Armstrong as an Entity Whose Rejection of the Plan Was Not in Good Faith; and (2) General Unsecured Creditors Who Reject the Plan as Entities Whose Rejections Were Not Solicited in Good Faith; Trustee's Alternative Motion under Bankruptcy Rule 3018(a) to Change Vote; Trustee's Motion Temporary Allowance of Certain Claims [docket no. 695] (the "Trustee's Voting Issues Motion"); Motion Dated November 30, 2001 Pursuant to Bankruptcy Rule 9019 and Bankruptcy Code Section 1123(b)(3) for Approval of Settlement Among Kenneth A. Rushton, Steppes Apartments, and Roger G. Segal [docket no. 613] (the "Steppes Settlement Motion"); and Motion Pursuant to Section 521(4) and Section 105(a) for Debtor to Comply with Duty to Surrender Property of the Estate Dated November 30, 2001, Motion for Valuation of Surrendered Property; Motion for Assumption of Executory Contract to the Extent Necessary [docket no. 612] (the "Surrender Motion"). Appearances were made at the hearings as noted on the record.

One objection was timely filed to the Plan by the Debtor, styled as Objections to Proposed Plan of Reorganization and Settlement Agreement between Steppes

Apartments, Ltd., Kenneth A. Rushton, and Roger G. Segal [docket no. 705]. On January 23, 2002, the Debtor untimely filed his Additional Objections to Proposed Plan of Reorganization and Settlement Agreement between Steppes Apartments, Ltd., Kenneth A. Rushton, and Roger G. Segal [docket no. 785] (together, these two objections will be referred to as the "Debtor's Objection"). The Debtor also filed his Memorandum in Opposition to Motion for Temporary Allowance of Claim Filed by Steppes Apartments, Ltd. [docket no. 703], his Memorandum in Opposition to Motion for Debtor to Comply with Duty to Surrender Property of the Estate; Motion for Valuation of Surrendered Property, Motion for Assumption of Executory Contract to the Extent Necessary by the Trustee [docket no. 704], and his Objection to Motion for Estimation of Claim No. 1, Claim of Steven R. Bailey, Trustee of Willow Brook Cottages, L.L.C. [docket no. 706] in opposition to related motions.

The Court, by separate Order dated January 17, 2002, temporarily allowed the claims of Steppes Apartments Ltd. (Steppes) ("Steppes Estimation Order") for voting purposes as a Secured Claim in the amount of $120,795 and as an Unsecured Claim in the Amount of $1,398,979 [docket no. 775]. The Court also orally estimated the claim of Steven R. Bailey as trustee in the Willow Brook Cottage's case in the amount of $81,997.24. Execution of that order is pending.

The Court has reviewed and considered the Plan, the Trustee's Motion to Approve Settlement, the Trustee's Voting Issues Motion, and the Surrender Motion (and objections thereto). The Court has also previously ruled on the Steppes Temporary Allowance Motion and the Willow Brook Estimation Motion, and incorporates the same

herein. The Court has reviewed and considered memoranda filed in connection with the Plan, the Debtor's Objection, documentary and oral evidence presented and proffered, the credibility of witnesses, the argument of counsel and the Debtor made at the hearings, and has made an independent review of applicable statutes and case law. Accordingly, the Court finds and concludes pursuant to Bankr. Rule 9014 and Fed. R. Civ. P. 7052, as follows:

A. *Jurisdiction.* All proceedings noted are core proceedings under 28 U.S.C. § 157. This Court has jurisdiction with respect to these proceedings under 28 U.S.C. § 1334.

B. *Notice.* Notice to parties in interest of the time fixed for filing objections and the hearing to consider confirmation of the Plan has been given and is sufficient pursuant to applicable law under, among other provisions, Sections 1126, 1128 and 1129 of the Bankruptcy Code and Fed. R. Bankr. P. 2002, 3017, 3018 and 3019. Notice of the Litigation Injunction was described in specific and conspicuous language in both the Disclosure Statement and the Plan, and the parties to which it applies were specified by name and category. The Steppes Settlement Agreement was properly noticed pursuant to Fed. R. Bankr. P. 9019(a). The solicitation package with respect to the Plan (which included the Plan and Disclosure Statement, the Court's Order fixing deadlines and the hearing date on confirmation of the Plan, a notice regarding objection and voting deadlines and hearing on confirmation of the Plan and, where applicable, a ballot) was properly served on all necessary parties [docket no. 581]. The Trustee has satisfied his obligations with respect to service of these documents on parties in interest. Copies of the Willow Brook

Estimation Motion, the Trustee's Voting Issues Motion, and the Surrender Motion, and notices of hearing and right to object thereto, were also properly served on all necessary parties.

C. *Acceptance*. The balloting process on the Plan as conducted by the Trustee has been proper; the Debtor's interference with the balloting process has been remedied in an appropriate manner; and the Plan has been accepted in writing by the creditors whose acceptance is required by law.

D. *Debtor's Objection*. The Debtor's Objection has been considered by the Court and is overruled. The Debtor's objections to the Willow Brook Estimation Motion, the Trustee's Voting Issues Motion, and the Surrender Motion have been considered by the Court and are overruled.

E. *Plan Conditions to Confirmation*. All conditions to Confirmation set forth in the Plan have been satisfied or effectively waived.

F. *Section 1129(a)(1)*. The Plan complies with the applicable provisions of the Bankruptcy Code, including without limitation the provisions of the Bankruptcy Code respecting classification of claims and the requirements of Section 1123 of the Bankruptcy Code.

G. *Section 1129(a)(2)*. The Trustee has complied with the applicable provisions of the Bankruptcy Code.

H. *Section 1129(a)(3)*. The Plan has been proposed in good faith and not by any means forbidden by law.

I. *Section 1129(a)(4)*. All trustee compensation and professional compensation and reimbursement of expenses

for services and costs in or in connection with the case and in connection with the Plan and incident to the case has been approved or are subject to the approval of the Court as reasonable.

J. *Section 1129(a)(5).* The identity, qualifications, and affiliations of the person to be Plan Trustee after confirmation have been disclosed, and the appointment of Kenneth A. Rushton to such position is equitable, consistent with the interests of creditors and the Debtor, and with public policy. The nature of the Plan Trustee's compensation has been fully disclosed.

K. *Section 1129(a)(6).* The Plan does not propose any changes of rates under the jurisdiction of any regulatory body and this section is therefore not applicable in this case.

L. *Section 1129(a)(7).* Each holder of a Claim or equity interest has accepted the Plan or will receive or retain under the Plan property of a value, as of the effective date of the Plan, that is not less than the amount that such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date.

M. *Section 1129(a)(8).* Exhibit no. 246 sets forth the voting results of ballots returned with respect to the Plan. Class 1 is not impaired. Classes 2A and 2C have voted to accept the Plan because the only creditor in each of those classes voted to accept the Plan, and the Court temporarily allowed or estimated the claim in each of those Classes for voting. With respect to Class 4, the Court ruled orally

on the Trustee's Voting Rights Motion[2] that the Claims of Enis & Gilchrist, Linda Jenkins, and Robert Smith (collectively, the "Disputed Class 4 Claims") were held 70% by the Trustee and 30% by the Debtor pursuant to the Court's Order [docket no. 353] which approved a transfer to the Debtor of rights against creditors holding those Claims with the proviso that the Estate would receive 70% of any collection or recovery against the holders of such claims. The Debtor purported to vote the full amount of each of the Disputed Class 4 Claims as rejecting claims in Class 4. Following the Court's ruling, the Trustee voted whatever portions of the Disputed Class 4 Claims he holds in favor of the Plan. In voting the Disputed Class 4 Claims, the Trustee asserted the right as the majority owner of those claims to vote the full amount of each claim as an accepting claim in Class 4. Whether the Trustee votes the full amount of the Disputed Class 4 Claims or 70% of them, or whether each of these claims is treated as two claims for voting purposes to be voted by the Trustee and the Debtor, Class 4 has voted to accept the Plan because creditors who hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by such creditors have voted to accept the Plan.[3] 11 U.S.C.

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[2] The Court's ruling on the Trustee's Voting Rights Motion is reduced to writing in this Order.

[3] If the Trustee is permitted to vote the full amount of the Disputed Class 4 Claims, then 8 Claims voting in that Class voted to accept the Plan and 4 voted to reject, with claims totaling $1,604,25.22 [sic] voting to accept and $89,774.87 voting to reject the Plan. If the Trustee is permitted to vote 70% of each Disputed Class 4 Claim and the Debtor 30% (with the Disputed Class 4 Claims being split for purposes both of number of claims voting and for amounts voted, then the voting in Class 4 is 7.1 votes to accept the Plan and 4.9 votes to reject the Plan, with claim amounts totalling $1,569,024.76 in favor of the Plan and $125,009.33 against the Plan. If each of the Disputed Class 4 Claims is

(Continued on following page)

§ 1126(c). Under the reasoning of *In re RUTI-Sweetwater, Inc.*, 836 F.2d 1263, 1267 (10th Cir. 1988), Classes 2B, 2D, 2E, and 3A are deemed to have accepted the Plan because no one in those secured classes voted on the Plan or objected to the Plan. There are no creditors in Class 2F or 3B.

N. *Section 1129(a)(9).* Except to the extent that a holder of a particular claim has agreed to a different treatment of such claim, the Plan satisfies the requirements of Section 1129(a)(9) with respect to the payment of claims having priority under Section 507 of the Bankruptcy Code.

O. *Section 1129(a)(10).* Classes 2A, 2C, and 4 are impaired classes that have voted to accept the Plan, determined without including any acceptance of the Plan by any insider.

P. *Section 1129(a)(11).* Confirmation of the Plan is not likely to be followed by the further liquidation or the need for further financial reorganization of the Debtor except as provided in the Plan.

Q. *Section 1129(a)(12).* All fees under 28 U.S.C. § 1930, as determined by the Court at the hearing on confirmation of the Plan, have been or will be paid on the effective date of the Plan.

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split so that each would be counted as two votes in Class 4, but the Trustee would vote 70% of each Disputed Class 4 Claim and the Debtor 30% of each Disputed Class 4 Claim, the result would be 8 votes to accept the Plan, 4 votes to reject the Plan, with claims totaling $1,569,024.76 in favor of the Plan and $125,009.33 against the Plan. in each of these three alternative scenarios, the requirements of Section 1126(d) for acceptance of the Plan are met with respect to Class 4.

R. *Section 1129(a)(13).* Section 1129(a)(14) is inapplicable in this case.

S. *Section 1129(b).*

(1) *Class 5.* The requirements of Section 1129(b) of the Bankruptcy Code have been met with respect to Class 5 under the Plan because the Plan does not discriminate unfairly, and is fair and equitable with respect to Class 5, in that the Plan provides that no holder of an interest in a class junior to Class 5 will receive or retain under the Plan on account of such junior interest any property. There is no class of interests junior to Class 5.

(2) *Alternative Cramdown Findings with Respect to Classes 2B, 2D, 2E, and 3A.* The Court has found and concluded that Classes 2B, 2D, 2E, and 3A are deemed to have accepted the Plan pursuant to *In re RUTI-Sweetwater,* 836 F.2d 1263 (10th Cir. 1988). Alternatively, the requirements of Section 1129(b) of the Bankruptcy Code have been met with respect to Classes 2B, 2D, 2E, and 3A under the Plan because the Plan does not discriminate unfairly, and is fair and equitable, with respect to these Classes, in that the Plan provides for the sale or abandonment of the property securing such claims with the holder of such claim receiving thereby either the property securing such claims or the proceeds of such sale to the extent of the allowed amount of such claim.

3. *Alternative Cramdown Findings with Respect to Class 4.* Based on rulings of the Court related to votes in Class 4, the Court has found that Class 4 is an accepting class of claims. Alternatively, the requirements of Section 1129(b) of the Bankruptcy Code have been met with respect to Class 4 under the Plan because the Plan does not discriminate unfairly, and is fair and equitable, with

respect to Class 4, in that the Plan provides that no holder of a class of claims junior to Class 4 (there are none) or that a class of interests will receive or retain under the Plan on account of such interest any property. If it is determined on appeal that Class 4 is not an accepting class, interest on Allowed Unsecured Claims will accrue from the effective date of the Plan at the legal rate under 28 U.S.C. § 1961 and will be paid prior to any distribution to the holder of the Class 5 interest.

T. *Trustee's Voting Rights Motion.* The Court previously made findings of fact and conclusions of law on the Trustee's Voting Issues Motion on the record on January 15, 2002. In addition to those rulings which are incorporated herein, the Court determines that by his actions in sending letters to all or virtually all of the creditors of this estate making false and misleading statements regarding the case and the legal effect of actions taken therein, the Debtor has tainted the voting on the Plan. It is impossible to know how many creditors did not vote on the Plan because of the Debtor's actions or how his actions may have impacted those who did vote. The Debtor's actions in distributing two letters to virtually all creditors in this case was done in bad faith. The letters distributed by the Debtor were replete with statements of law and fact that the Debtor knew to be misstatements and knew to be inaccurate, and the letters misrepresented the circumstances of the Plan. Further, the Debtor knew he was prohibited from distributing those misstatements to creditors, and knew some of the issues in his letters had been discussed by the Court at length at the disclosure statement hearing. Nonetheless, the Debtor knowingly and intentionally circulated the misinformation in an attempt to improperly influence creditors' votes.

In spite of the Debtor's bad faith effort to improperly influence voting, ballots cast in all classes voting on the Plan voted to accept the Plan except for Classes 4 and 5. The Debtor purported to vote the Disputed Class 4 Claims in spite of the fact that the 70% majority ownership interest in such claims is held by the Estate. The Trustee had not and has not abandoned the Estate's interest in the Disputed Class 4 Claims pursuant to the Disclosure Statement or any order approving the Disclosure Statement. Such rights to the Disputed Class 4 Claims are vested rights and are not residual rights. The Trustee's rights to assert ownership by the Estate over the Disputed Class 4 Claims arose and vested prior to the Confirmation Date of this Plan and, thus, any abandonment provision under the Plan does not affect the Trustee's rights to the Disputed Class 4 Claims including the provision 7.3 of the Plan. Rather, the Trustee has asserted the Estate's ownership of 70% of the Disputed Class 4 Claims, which ownership interest has vested and been recognized by this Court, and the Trustee has been allowed by this Court to vote the Estate's ownership interest in the Disputed Class 4 Claims. The Trustee does not abandon, pursuant to the Plan, the Estate's ownership interest in the Disputed Class 4 Claims. With respect to any residual rights or claims (not including in any way the Disputed Class 4 Claims) of the Estate and Trustee under the Order Approving Trustee's Motion for Sale [exhibit no. 212) and as to which no settlement or disposition vested rights in the Trustee prior to the Confirmation Date, such residual rights are abandoned pursuant to Section 7.3 of the Plan.

U. *Steppes Settlement Motion.* The parties entered into a settlement agreement among Kenneth A. Rushton, Steppes Apartments, and Roger G. Segal as trustee of the

estate of Mountain Pacific Ventures, Inc. (MPV) (the "Steppes Settlement Agreement"). The Steppes Settlement Agreement resolves Steppes' claims against this Estate premised upon its theories of fraudulent transfer, conspiracy, alter ego, constructive trust, unjust enrichment, and declaratory judgment based upon the Amended Complaint in the case of *Steppes Apartments, Ltd. v. Donald E. Armstrong, et al.*; claims for malicious prosecution, abuse of process, and/or wrongful use of civil proceedings, as set forth in Steppes Nondischargeability Complaint against the debtor; and claims based upon this Estate as the successor-in-interest to the Donald E. Armstrong Family Trust and/or the Donald E. Armstrong Charitable Remainder Unitrust, (the Armstrong Family Trust and Charitable Remainder Unitrust are collectively referred to as the "Trusts"). and/or to the extent that the assets and liabilities of the Family Trust and/or Unitrust are part of this estate. The Steppes Settlement Agreement also resolves this Estate's claims against the MPV Estate based upon asserted fraudulent transfers, and the defense asserted by the MPV estate that the *lis pendens* filed by Steppes against property of MPV consistutes a wrongful lien. In considering whether to approve the settlement, this Court must make an informed decision based upon an objective evaluation of developed facts. *Reiss v. Hagmann*, 881 F.2d 890, 891-92 (10th Cir. 1989) (recognizing the considerations set forth in *American Employers' Insurance Co.*, and applying them to a Chapter 7 context). While the Tenth Circuit has not articulated specific factors for consideration, in *Reiss v. Hagmann*, 881 F.2d at 891-92, the court recognized those factors set forth in *Protective Committee Stockholders v. Anderson*, 390 U.S. 414, 424-25 (1968), and *American Employers' Insurance Co. v. King Resources Co.*, 556 F.2d 471, 475 (10th Cir. 1977). Based

thereon, the Court concludes that the Steppes Settlement Agreement was entered into in good faith, the Steppes Settlement Agreement is fair and equitable and in the best interests of creditors, and the Trustee has properly exercised his business judgment as follows:

(1) *Probability of Success on the Merits.* As this Court found in the Steppes Estimation Order, it is likely that the Debtor and the Estate are liable to Steppes and that Steppes holds significant secured and unsecured claims against the Debtor and the Estate based on theories as set forth above and as described in the Steppes Estimation Order. It also appears that Steppes has suffered significant damages that could be proven at trial. It is unlikely that the Trustee would prevail against Steppes and the Steppes Parties in litigation to any meaningful degree on affirmative claims for damages on account of a *lis pendens* filed by Steppes, for wrongful use of civil proceedings, abuse of process, for conspiracy, or any other cause of action or theory asserted by the Debtor. The Estate faces numerous legal and evidentiary challenges in establishing any claim against Steppes. Furthermore, the testimony of the Debtor respecting his or the Estates claims against Steppes and in support of his defenses against the claims is not credible, and the defenses raised by Armstrong to those claims are not supported by persuasive evidence and are inconsistent with prevailing law. The Debtor has asserted these claims and defenses in the past in various courts and has not prevailed. Judge Sam granted partial summary judgment in favor of Steppes with respect to a counterclaim and defenses asserted in Civil No. 2:97-CV-663ST in the United States District Court for the District of Utah [exhibit no. 86]. Judge Stewart ordered that the Debtor's answer be stricken in the same action and ruled

in favor of Steppes on all claims [exhibit no. 5]. That ruling was never reduced to a written order only because the Debtor filed Chapter 11 shortly after the ruling. The judgments against the Trusts controlled by the Debtor prepetition have been affirmed on appeal by an intermediate Texas State court of appeals and the Texas Supreme Court has denied petitions for review filed by the Debtor and others [exhibit no. 102]. The Debtor's attempts to collaterally attack these Texas judgments have been made in bad faith and in violation of various legal principles. Therefore, the Trustee's assessment of the probability of success on the merits of litigation strongly supports approval of the Steppes Settlement.

(2) *Difficulties to Be Encountered in Collection of a Judgment*. There is no evidence that has been presented that the Trustee would or would not be able to collect a judgment against Steppes if he were to be successful in litigation against Steppes. Thus, this factor does not weigh in favor or against approval of the Steppes Settlement.

(3) *Complexity, Expense, Inconvenience. and Delay in Pursuing Claims*. The claims and defenses asserted by the Debtor against Steppes have resulted in significant expense, inconvenience, and delay to Steppes and to the Estate. Although these claims asserted by the Debtor are convoluted, redundant and based upon the Debtors shifting factual interpretations, they do not appear to be unusually complex. However, the only alternative to the Settlement Agreement is continued litigation between the parties, including the Estate, the Debtor and Steppes, and the Court concludes that continued litigation would exhaust any funds in the Estate before it could he resolved and would consequently eliminate any return to creditors. If the Settlement is not approved, the Court concludes that

continued litigation is inescapable, given the parties past history, pending actions, Armstrong's stated purpose to continue this litigation at all costs, and Steppes apparent resource to fund litigation. Even were one of the parties to succeed at a trial court level, the other would surely appeal until there is no further appeal available. Armstrong, would then, as in the past, attempt to collaterally attack any judgment and refuse to acknowledge any loss or the finality of any judgment. Therefore, if the Steppes Settlement Agreement is not approved, the litigation would continue indefinitely at great expense. This factor supports approval of the Steppes Settlement Agreement, particularly in light of the significant likelihood that the Estate would not be successful in claims asserted against Steppes or in defeating claims asserted by Steppes.

(4) *Interests of Creditors, with Deference to Their Reasonable Views.* Few creditors have participated actively in this case. The majority of creditors voting on the Plan voted to accept the Plan. Only one creditor whose vote was not exercised by the Debtor as part of a settlement with the Debtor voted to reject the Plan. [Ballot Summary attached to exhibit no. 246.] The Steppes Settlement Agreement is in the best interest of all parties inasmuch as it resolves over seven years of litigation and secures for each creditor a reasonable and definable recovery from this estate. Were the litigation to continue, it would consume any moneys the estate may hold and there would likely be no distribution to unsecured creditors or equity interest holders. If the case were converted to chapter 7 because the Steppes Settlement Agreement was not approved, there would also likely be no distribution to creditors, because continued costs of litigation would consume the Estate until it was closed, with no return

other than to administrative claimants, if even they could be satisfied. Under the Steppes Settlement Agreement, the creditors may receive the benefit of full payment of their claims and the Estate will be released of all potential or contingent liability to Steppes and MPV. This Estate will also receive the benefit of a substantial reduction in the amount of Steppes' claim that could be allowed, a result which may not occur if the various adversary proceedings continued. The probability is high that if the issues were fully litigated, a judgment may enter in excess of the Steppes stipulated claims. The Trustee, in entering into the Steppes Settlement Agreement, properly considered the potential outcome of the Texas Litigation (as defined below) and the defenses and claims asserted by the Debtor to Steppes' claims. The Trustee insisted on and obtained, in the Steppes Settlement Agreement, a result that contemplated the possibility of a judgment against Steppes in the Texas Litigation. The Steppes Settlement Agreement is proposed and supported by competent and experienced attorneys, including two Chapter 11 Trustees, their respective counsel, as well as counsel for Steppes. The Steppes Settlement Agreement has also been approved in the MPV bankruptcy case. The Steppes Settlement Amount is within the range of potential outcome of such litigation, defenses and claims if they were actually litigated. *See Kopp v. All American Life Ins. Co. (In re Kopex Realty Venture Co.),* 213 B.R. 1020, 122 (10th Cir. BAP 1997) (recognizing a trustee's authority to enter into settlement agreements and setting forth four elements by which a court can make an informed decision concerning the propriety of a settlement agreement).

(5) *Litigation Injunction,* The Steppes Settlement Agreement, and the Plan, provide for a Litigation Injunction,

more fully described as a permanent injunction enjoining Armstrong, the Trusts, and all other Armstrong Entities from commencing or continuing litigation against the Steppes Parties (as defined in the Steppes Settlement Agreement), Roger Segal, the Trustee, and any of those parties' principals, professionals, agents, and assigns, based upon specific causes of actions set forth therein. The Litigation Injunction further provides, among other things, that Armstrong must apply to this Court for authority to commence or continue any litigation against these parties. Upon independent review of case law, the applicable pleadings, and based on the extensive evidentiary hearings on these matters, as well as considering those actions taken during the pendency of this case, this Court's assessment of the Litigation Injunction is as follows:

The Steppes Settlement Agreement is an essential element supporting resolution of the matters between this Estate and its creditors and requires that the Trustee seek the Litigation Injunction through the confirmed Plan. Failure to approve the Litigation Injunction would undoubtedly have four results: First, it would encourage the filing of a multiplicity of actions by and between Armstrong, Steppes, MPV, and this Estate; second, the ensuing litigation would be costly to this Estate in that this is a liquidation plan and, therefore, the estate holds limited assets that will only he depleted by further litigation; third, it would likely lead to a disorderly and inequitable distribution of assets to creditors, contrary to the contemplation of the Bankruptcy Code, the plan, and the Steppes Settlement Agreement; and fourth, it would result in substantial disruption of the Steppes Settlement Agreement which, in part, releases this Estate's liability to

Steppes. Therefore, absent the Litigation injunction, this Estate would suffer imminent and irreparable harm.

The Litigation Injunction is required for successful consummation of the Plan and payment of creditors in order to restrain further litigation and depletion of assets of the estate. Undoubtedly, the Plan rests on the Trustee's ability to focus his efforts on liquidation, not litigation. Steppes, the Estate and MPV have all made contributions to the Plan by approving the Steppes Settlement Agreement, and Steppes has made an important contribution to reorganization in compromising its claim, and the Plan provides for payment of substantially all of the claims affected by the release.

If the injunction is not granted, the Trustee will be subject to continued litigation and his ability to implement the terms of the confirmed plan will be significantly and adversely affected, which in turn adversely affects this Estate and, ultimately, all parties in interest. By comparison, the Litigation Injunction will have relatively few adverse effects inasmuch as Armstrong is the only party (other than the vote of English & Gloven) objecting to its issuance. The harm to Armstrong will be that he will be unable to satisfy his bent for uncontrolled litigation. However, that consideration has no merit in this context. Should any issue arise regarding the scope of the Litigation Injunction, Armstrong must apply to this Court for authority to commence or continue any litigation against these parties. Therefore, his rights are protected.

The issuance of the Litigation Injunction advances the public interest. By protecting the value of the Estate through the efficient and focused liquidation of its assets, the Litigation Injunction will conserve the liquidated

assets for the benefit of creditors as well as, potentially, Armstrong. To squander those assets in tireless litigation only serves to deplete the money available to creditors and Armstrong. In addition, the public interest is best served by preventing the inefficient use of judicial resources in the adjudication of whatever matters the enjoined parties may conceive. Voluminous pleadings and countless, unfruitful hearings only serve to clutter a court's docket and to deprive other parties of a court's attention. Moreover, the Litigation Injunction is in Armstrong's best interest. As a Class 5 creditor, he will receive any remaining residual benefit from the efficient liquidation of Estate assets rather than forcing the Trustee to divert those assets toward paying legal fees incurred in litigating matters. Further, the litigation injunction allows Armstrong to pursue his "fresh start" as contemplated by the Bankruptcy Code.

Finally, it is without question that this court has the authority to enjoin actions which threaten the integrity of the Estate. *In re Energy Co-op,* 886 F.2d 921 (7th Cir. 1989). Absent the injunction, the parties sought to be enjoined will continue the practice of bringing and defending against unyielding litigation. Armstrong has made unequivocal his intentions to collaterally attack the Texas Modified Judgment and any ruling of this or any other court that he feels affects him adversely. Similarly, Steppes has demonstrated that as long as Armstrong files various causes of action, it will defend against those actions whatever the cost. As a result, this Estate will undoubtedly have to participate in order to defend its interest against these recurring abuses and will, along with the other parties, incur substantial expense in litigating those matters, In addition, this Court's Case

Management Order dated November 7, 2000 orders all parties in this bankruptcy case not to interfere with the administration of the estate or its assets and to seek a Court ruling if they are unclear on what those boundaries are. Nevertheless, Armstrong has repeatedly violated that Case Management Order by filing duplicative complaints in various jurisdictions, attempting to assert control over interests of this Estate, and interfering with the administration of the estate. Nothing short of the Litigation Injunction will protect the estate. There is a cognizable danger of recurrent violations, and no representation that Armstrong may make that he will not continue to interfere with the administration of the Estate is reliable.

V. *Surrender Motion.* In connection with Surrender Motion, the Debtor has at all relevant times been the trustee of the Charitable Remainder Unitrust (organizational documents and amendments included as exhibit no. 213) and the Armstrong Family Trust (organizational documents and amendments included as exhibit no. 214). The rights of the Debtor as settlor and income beneficiary under the Armstrong Family Trust became property of this Estate. The rights of the Debtor as donor and recipient under the Charitable Remainder Unitrust also became property of this Estate. Also, two judgments (exhibits no. 203 and 204 at the confirmation hearing, hereinafter the "State Court Judgments") transferred the rights to all of the property of the Charitable Remainder Unitrust and the Armstrong Family Trust to the Debtor prior to the Debtor's bankruptcy filing. Thus, all of the property of the Trusts became property of this Estate. The property included, but is not limited to, any and all rights to pursue, prosecute, settle or otherwise exercise control or dominion over the so-called "Texas Litigation," litigation

beginning in Tarrant County Texas, Case No. 67-156473-94 and subsequently appealed and determined by an order entered by the Texas Court of Appeals [exhibit no. 1]. All petitions for of review to the Texas Supreme Court with respect to the Texas Litigation have been denied. The guarantee of John L. Feece [exhibit no.CC] and all rights thereunder in favor of the Trusts also became property of Debtor's Estate pursuant to the State Court Judgments. The evidence has also proven that all of the following causes of action are property of the Estate and have been wrongfully and contemptuously maintained by the Debtor and/or the Trusts: (1) litigation initiated by complaint [exhibit no. 50] and pending in Utah State District Court, Case No. 010600131; (2) litigation initiated by complaint [exhibit no. 53] and pending in United States District Court, Northern Division of Texas, Dallas Division, Case No. 3-01CV1722-L; (3) litigation initiated by complaint [exhibit no. 55] and pending in United States Bankruptcy Court, District of Utah, Adv. Proc. No. 01-2226; (4) litigation initiated by complaint [exhibit no. 57] and pending in the United States District Court, District of Utah, Civ. Case No. 01-CV-843. It is therefore determined that the Trustee has the authority to control the litigation described herein and similar litigation not described herein which has been or may be initiated by the Debtor.

The Debtor, as trustee of the Trusts, stipulated and caused such State Court Judgments to be entered in favor of himself. The State Court Judgments are final, valid, nonappealable orders of the Utah State Court and are binding upon the Debtor and the Trusts. The State Court Judgments do not constitute "contracts" of any type between the Debtor and the Trusts. The Debtor as trustee of the Trusts is responsible for complying with the State

Court Judgments and any court of competent jurisdiction, including this Court, may order the Debtor to comply with the State Court Judgments. The Debtor also effected the dissolution of the Armstrong Family Trust prior to this filing as evidenced by amendment 13 in exhibit no. 214.

It having been determined, after hearing on notice, that the Plan satisfies the requirements for confirmation set forth in 11 U.S.C. § 1129(a) and (b), and that good cause appears to grant the related motions as set forth below, and based on findings of fact and conclusions of law announced on the record and the foregoing findings of fact and conclusions of law, IT IS ORDERED that:

1. *Confirmation of the Plan.* The Plan is confirmed. A copy of the confirmed Plan is attached to this order as exhibit no. A.[4]

2. *Voting Rights.* The Trustee's Voting Rights Motion is granted. The Trustee owns and was authorized to vote 70% of each of the claims of Enis & Gilchrist, Linda Jenkins, and Robert Smith and the Debtor was authorized to vote 30% of such claims.

3. *Steppes Settlement.* The Steppes Settlement Agreement is approved and the Steppes Settlement Motion is granted.

4. *Surrender of Assets.* The Surrender Motion is granted. The Debtor is ordered to surrender to the Trustee and to cease exercising dominion or control over any of the following:

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[4] It appears that some of the pages of the docketed Plan are duplicates.

a. All causes of action, claims, assets, and personal property that is not exempt in the possession of and belonging to Donald E. Armstrong as of March 10, 2000, the date of filing. Such interests include the rights as settlor and beneficiary under the Armstrong Family Trust and the rights as recipient and donor under the Charitable Remainder Unitrust.

b. All causes of action, claims, assets, and personal property in the possession of and belonging to the Trusts as of November 26, 1999, and thereafter, including any rights that the Trusts may have had in the litigation referred to as the Texas Litigation, originally filed in Tarrant County, Texas, Case No. 67-156473-94, and any rights to appeal therefrom, including all petitions, writs and motions which may be brought in any court including the United States Supreme Court.

c. Donald E. Armstrong, as trustee of the Trusts and as Debtor in this case, is ordered to surrender any rights he or the Trusts purports to assert to the Texas Litigation (and all causes of action asserted therein) and all other litigation involving the Trusts or derived from rights belonging to the Trusts, including the following cases, claims and causes of action: (1) litigation initiated by complaint [exhibit no. 50] and pending in Utah State District Court, Case No. 010600131; (2) litigation initiated by complaint [exhibit no. 53] and pending in United States District Court, Northern Division of Texas, Dallas Division, Case No. 3-01CV1722-L; (3) litigation initiated by complaint [exhibit no. 55] and pending in United States Bankruptcy Court, District of Utah, Adv. Proc. No. 01-2226; (4) litigation initiated by complaint [exhibit no.57] and pending in United States District Court, District of Utah, Civ. Case No. 01-CV-843. The Debtor is ordered and

required to surrender the foregoing causes of action, suits, choses in action and claims by obtaining the dismissal of each of the specific causes of action set forth above. With respect to any other cause of action maintained by the Trusts or otherwise belonging to the Estate, the Debtor is instructed to seek direction from the Trustee with respect to the surrender of such cause of action. To the extent the Debtor fails, within 15 days after the entry of this Order, to effectuate the dismissal of the litigation identified in this paragraph, the Trustee shall have the right to effectuate the dismissal of such litigation by presenting this Order in the case on behalf of the Debtor and effecting a dismissal with prejudice.

d. Donald E. Armstrong, as trustee of the Trusts and as Debtor in this case, is ordered to surrender all assets of the Trusts, including (1) the guarantee of John L. Feece [exhibit no. CC] executed in favor of the Trusts dated September 29, 1994; (2) the notes and trust deeds executed by Steppes in favor of the Trusts including the Note dated September 29, 1994, in the original principal amount of $375,250, and recorded on September 29, 1994 as Instrument No. D194217212 executed by Steppes and the Armstrong Family Trust and the Trust Deed associated therewith recorded as Instrument No. D194217212, the note dated September 29, 1994 in the original principal amount of $1,071,500 executed by Steppes, together with the Trust Deed associated therewith and recorded as Instrument D194217210, and other associated documents including the "Assignment of Rents and Leases and UCC-1 Fixture Filing" which were closing documents issued from Escrow No. GF#AH-94CO7667-RCS associated with the aforementioned notes and trust deeds; (3) all other personal property of the Trusts. These items of property shall

be considered immediately surrendered by the Debtor and transferred to the Estate, to the extent necessary, by virtue of the execution of this order without the need of any further documentation. This order shall be proof of the Trustee's ownership of such property and the Trustee may use this document to establish the Estate's interest in such property.

e. The Estate's interest as settlor shall be exercised by the Trustee to the extent necessary to complete the revocation and dissolution of the Armstrong Family Trust. Armstrong shall have no right to participate in the dissolution of the Armstrong Family Trust or to assert any interest associated with the Armstrong Family Trust.

f. The Debtor, as Trustee of the Charitable Remainder Unitrust, is ordered to comply with the State Court Judgments and surrender any and all property, claims, assets, and causes of action to this Estate until such time as he is removed as Trustee of the Charitable Remainder Unitrust by this Estate acting as Donor of the Charitable Remainder Unitrust.

g. The litigation rights belonging to this Estate derived from the Trusts which afford this Estate rights against Steppes, including the Texas Litigation, are valued for the purpose of this ruling only at $1,398,979 and shall be deemed to satisfy the State Court Judgments in that amount.

5. *Objections Overruled.* The Debtor's Objection and all other objections, if any, to the Plan, and all objections to the Trustee's Voting Rights Motion, the Steppes Settlement Motion, and the Surrender Motion are overruled.

6. *Implementation of the Plan.* The Trustee is hereby authorized to take all steps and execute any and all documents necessary or appropriate to implement the Plan, the Steppes Settlement, and the Debtor's surrender of assets.

7. *Discharge of the Debtor.* Except as otherwise provided in the Plan and in the Bankruptcy Code, effective on the Effective Date, to the extent permissible under Section 1141 of the Bankruptcy Code, the Debtor is discharged of all prepetition debts of, claims against, liens on, and interests in the Debtor, his assets, or properties, which debts, claims, liens, and interests arose at any time before the entry of the filing of this Case. Because the Debtor is an individual debtor, confirmation of the Plan does not discharge him from any debt excepted from discharge under Section 523 of the Bankruptcy Code.

8. *Releases.*

A. *Steppes Release.* The release by the Trustee and the Estate of any and all claims arising from events that occured before Confirmation, including claims of any nature whatsoever that the Trustee or the Estate hold for monetary damages or otherwise, whether known or unknown, liquidated or unliquidated, against Steppes (as defined in the Plan), the Steppes Parties (as defined in the Plan), and Steppes employees, principals, professionals, agents, successors-in-interest, and assigns, is approved.

B. *Release of the Estate.* Except as otherwise expressly provided in the Plan, on the Effective Date, all Persons who have held, hold, or may hold claims, in consideration for the obligations of the Estate under the Plan, will be deemed to have forever waived, released, and discharged all rights or claims, whether based upon tort,

fraud, contract, or otherwise, which they heretofore, now, or hereafter possess or may possess against the Estate existing prior to the Effective Date, except as set forth in the Plan.

9. *Injunctions.*

A. *Section 1141 Injunction.* In accordance with Section 524 of the Bankruptcy Code, the discharge provided by this section and Section 1141 of the Bankruptcy Code, *inter alia*, shall act as an injunction against the commencement or continuation of any action, employment of process, or act to collect, offset, or recover the claims discharged hereby.

B. *Litigation Injunction.* Donald E. Armstrong, the Donald E. Armstrong Family Trust, the Donald E. Armstrong Charitable Remainder Unitrust, and any other entity related to the Debtor and controlled by him in whole or in part, now and in the future, and any other entity over which the Debtor asserts actual control in whole or in part, now and in the future, their agents, attorneys and those acting in concert with them, are hereby permanently enjoined from commencing or continuing any litigation against Steppes Apartments, Ltd., John Feece, Rosalie Feece, Baxter Holdings, Inc., Jeffrey L. Shields, Zachary T. Shields, Callister Nebeker & McCullough, Robert Bodoin, Hill Gilstrap, Frank Hill, Frank Gilstrap, Sal Espino, Chris Harris, Ben Levinson, Victor Vilaplana, Dennis Wickham, Elizabeth Smith, and Seltzer Caplin McMahon Vitek, and any and all other attorneys of Steppes and their law firms and all employees of such firms, Roger G. Segal as trustee in *In re Mountain Pacific Ventures, Inc.*, Bankr. Case No. 99-22588, Kenneth A. Rushton, the Trustee in this case, and these parties' principals, professionals,

agents, and assigns based upon (1) claims or causes of action released pursuant to the terms of this Plan and the Steppes Settlement Agreement, and (2) claims or causes of action based upon action taken by the Trustee, Segal, the Steppes Parties (all as defined in the Plan) and any of those parties' principals, professionals, agents, and assigns in effectuating the Steppes Settlement Agreement and this Plan. *See also* Fed. R. Bankr. P. 3016(c)(2002).

Armstrong must apply to the Court for authority to commence litigation against any of these parties or their principals, professionals, agents, or assigns, must show that the proposed litigation does not violate the terms of this Plan, and must provide reasonable notice and opportunity to respond to the party against whom Armstrong wishes to proceed. The Court will grant such authority only upon a finding that such litigation does not violate the terms of this Plan, including the Litigation Injunction and the Releases described in Sections 12.1.1.1 and 12.1.1.2 of the Plan. If Armstrong applies to the Court to pursue such litigation and his application is denied, then the party or parties responding to the application shall be awarded reimbursement of attorneys' fees and costs reasonably incurred in connection with the application, with such reimbursement to be paid from the Reorganization Trust.

10. *Retention of Jurisdiction*. The Court shall retain exclusive jurisdiction of this case for the purposes set forth in the Plan, including without limitation, to adjudicate all controversies concerning the classification or allowance of claims, to make such Orders as are necessary or appropriate to aid the consummation of the Plan and to ensure the implementation of the provisions of the Plan and this

Order in the manner provided under Section 1142 of the Code and Fed. R. Bankr. P. 3020(d).

11. *Plan and Order Binding.* The provisions of the Plan and this Order are hereby made binding upon the Trustee, the Debtor, and any and all holders of claims against or interest in the Debtor, whether or not such claim or interest is impaired under the Plan, and whether or not such holder of a claim has accepted or rejected the Plan.

12. *No Release of Regulatory Obligations.* Nothing in this Confirmation Order or the Plan releases any entity from any liability to the United States or the State of Utah under any police or regulatory statute enforceable by the United States or the State of Utah, as the owner or operator of property after the Effective Date, nor shall anything in the Confirmation Order or Plan discharge any claim of the United States or the State of Utah under environmental statutes that arises after confirmation of the Plan.

13. *Trustee to Give Notice of Entry of Confirmation Order.* Trustee shall give to all creditors and parties in interest notice by mail of the entry of this Order in accordance with Fed. R. Bankr. P. 2002(f)(7) and shall file a certificate evidencing such service.

Dated: January 31, 2002

BY THE COURT:

Judith A. Boulden
Honorable Judith A. Boulden
United States Bankruptcy
Judge

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing ***FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DATED JANUARY 31, 2002, CONFIRMING AND APPROVING TRUSTEE'S SECOND REVISED PLAN OF REORGANIZATION DATED NOVEMBER 19, 2001 [Docket No. 5731 AND GRANTING RELATED MOTIONS [Docket Nos. 612, 613, and 69.5]*** upon the following at the address set forth below, postage prepaid, by depositing the same in the United States Mail on the 31st day of January, 2002.

Jeffrey L. Shields, Esq. and Zachary T. Shields, Esq
Callister Nebeker & McCullough
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Salt Lake City, UT 84133
Attorneys for Steppes Apartments, Ltd.

Kenneth L Cannon II, Esq. and Penrod W. Keith, Esq.
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
136 South Main Street, Suite 1000
Salt Lake City, UT 84101
Attorneys for Kenneth A. Rushton, Chapter 11 Trustee.

Duane H. Gillman, Esq.
McDowell & Gillman
Twelfth Floor
50 West Broadway
Salt Lake City, Utah 84101
Attorneys for Steven R. Bailey, Trustee of
the estate of Willow Brook Cottages, L.L.C.

Peter Kuhn, Esq.
U.S. Trustee's Office
9 Exchange Place, Suite 100
Salt Lake City, UT 84111

Donald Erwin Armstrong
P. O. Box 1059
Park City, UT 84060

[Illegible]
Law Clerk

APPENDIX 3

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN RE:	)	
MOUNTAIN PACIFIC VENTURES, INC.	)	Case No. 99-22588 Chapter 11
Debtor.	)	

ORDER

On the 9th day of July, 2002, the Motion for Relief from Stay to Pursue Collection of the Transwest Credit Union Note and the 1993 Suzuki filed by the Debtor; Trustee's Response; Motion to Compel Roger G. Segal to Comply with the Court's March 11, 2002 Ruling Relation to the Transwest Credit Union Claim filed by the Debtor; and Response by Roger G. Segal, Trustee, came on for hearing. Counsel appearing were Julie Bryan for Roger Segal; Kenneth Cannon and Penrod Keith for Kenneth Rushton, Chapter 11 Trustee of the Estate of Donald E. Armstrong; Jeffrey Shields for Steppes Apartments; and Donald Armstrong, pro se. After hearing evidence presented, the Court does hereby enter the following findings and conclusions in conformity with Rule 7052, Fed. R. Bankr. P., in this core proceeding.

Armstrong seeks relief from the stay to pursue collection of the Transwest Credit Union Note and also seeks to compel the Chapter 11 Trustee, Roger Segal, to comply with the Judge Boulden's ruling on March 11, 2002. Armstrong borrowed money from Transwest Credit Union in his personal capacity. However, the title to the 1993

Suzuki was held in the name of Mountain Pacific Ventures ("MPV"). This vehicle has always been used by Armstrong. At the hearing, Armstrong testified that the vehicle has 108,000 miles on it. Further, only he has driven it during the course of MPV's bankruptcy without payment to MPV for the use of the vehicle. The vehicle is valued at approximately $1,500. At some point, Armstrong purchased the note from Transwest. Armstrong alleges that the claim is approximately $7,300. A Minute Entry was entered on March 11, 2002, which provides:

> Minute Entry Re: Motion to Designate Donald Armstrong's Votes Under 11 U.S.C. 1126(e)(2) Objection to the claim of Transwest Credit Union. Confirmation of the plan is confirmed. The trustee will resolve the claim of Transwest as proposed by the court. Motion granted to designate votes. Appearances: Julie Bryan, Kenneth Cannon, Don Armstrong, Jeffrey L. Shields, Peter Kuhn; (related document(s) *303, 293, 305*). (th,) (EOD: 3/11/2002)

On May 3, 2002, an Order was entered confirming the Plan, which provides, in pertinent part, as follows:

> D. *Armstrong's Objection*. The Armstrong Objection has been considered by the Court. The Court finds that it is reasonable and proper to amend the Plan to provide that the collateral securing Transwest Credit Union's claim (a 1993 Suzuki Sidekick) shall either be retained, in full satisfaction of the claim of Transwest Credit Union or surrendered to the Trustee within 60 days of the entry of this Order. In the event the collateral is turned over to the Trustee, the Trustee shall sell the collateral and turn the proceeds over to holder of the claim of Transwest Credit Union. In the event a deficiency

> exists in the amount necessary to satisfy the obligation owed, Transwest Credit Union, Transwest Credit Union or its assignee may file a proof of claim asserting an unsecured claim in the amount of the deficiency. The Trustee shall have 30 days thereafter to object to the claim. Any allowed unsecured claim shall be paid on par with other allowed unsecured claims under class 3 of the Plan. With said modification of the Plan, the Court finds the claim of Transwest Credit Union is unimpaired. Any and all objections raised by Armstrong to confirmation of the Plan are overruled.

Mr. Armstrong submitted into evidence a transcript of the March 11, 2002 hearing and the Court finds that the Order Confirming Plan is consistent with the hearing on March 11, 2002.

Section 362(d) allows relief from the stay for cause. A confirmed plan binds the debtor, creditor and any entity acquiring property under the plan. 11 U.S.C. §1141(a). Clearly, the Order provides that Armstrong can either retain the vehicle in full satisfaction of the debt or sell the vehicle and file a claim for the deficiency. The sale of the vehicle was to take place within sixty (60) days from the date of the Order. That time has now expired. Thus, counsel for Segal stated that the title would be turned over and the Trustee would abandon the 1993 Suzuki to Armstrong in full satisfaction of the debt. Thus, Armstrong does not need relief from the stay to collect on the note. It has been satisfied by the abandonment of the vehicle which is consistent with the Order Confirming Plan. The Motion to Compel will be granted to the extent the Trustee is required to turnover title to the vehicle to the Suzuki.

IT IS THEREFORE ORDERED that the Motion for Relief from Stay to Pursue Collection of the Transwest Credit Union Note and 1993 Suzuki filed by the Debtor is **denied**.

IT IS FURTHER ORDERED that the Motion to Compel Roger G. Segal to Comply with the Court's March 11, 2002 Ruling Relating to the Transwest Credit Union Note Claim is **granted in part and denied in part**.

DATED this ___ day of July, 2002.

/s/ Tom R. Cornish
TOM R. CORNISH
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Order, postage prepaid, this ___ day of July, 2002, to the following:

Donald E. Armstrong
P.O. Box 1059
Park City, UT 84060

Julie A. Bryan
Cohne, Rappaport & Segal
525 East 100 South, 5th Floor
P.O. Box 11008
Salt Lake City, UT 84147-0008

/s/ Tina Coates
Tina Coates

APPENDIX 4

Penrod W. Keith (Utah Bar No.4860)
Mark W. Dykes (Utah Bar No. 5067)
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
136 South Main Street, Suite 1000
Salt Lake City, Utah 84103
Telephone: (801) 320-6700
Facsimile: (801) 359-8256

Counsel for proposed intervener,
Kenneth A. Rushton

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re: MOUNTAIN PACIFIC VENTURES, INC., Debtor.	Bankruptcy No. 99C-22588 Chapter 11
ROGER G. SEGAL, Chapter 11 Trustee of the bankruptcy estate of MOUNTAIN PACIFIC VENTURES, INC., Plaintiff, vs. STEPPES APARTMENTS, LTD., and Does 1 through 6 inclusive Defendants.	Adversary Proceeding No. 99P-2218

ORDER APPROVING STIPULATED MOTION OF KENNETH A. RUSHTON, CHAPTER 11 TRUSTEE FOR THE ESTATE OF DONALD E. ARMSTRONG, TO DISMISS THIS LITIGATION

(Filed Jul. 18, 2002)

Based on the Stipulated Motion of Kenneth A. Rushton, Chapter 11 Trustee for the Estate of Donald E. Armstrong, to Dismiss this Litigation the court hereby ORDERS that this adversary proceeding be dismissed with prejudice.

DATED this 29th day of July, 2002.

BY THE COURT

/s/ Tom Cornish
The Honorable Tom R. Cornish
United State Bankruptcy Court
Judge

APPROVED AS TO FORM:

LeBOEUF, LAMB, GREENE & MacRAE, LLP

By: /s/ Penrod W. Keith
Penrod W. Keith, Counsel for
Kenneth A. Rushton, Chapter 11
Trustee for the Estate of Donald E. Armstrong

CALLISTER, NEBEKER & McCULLOUGH

By: /s/ Zachary T. Shields
Zachary T. Shields,
Counsel for Defendants,
Steppes Apartments Ltd.

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served on the 9 day of August ~~July~~, 2002, via first class mail, postage prepaid, on the following:

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Lehi, UT 84043

Donald E. Armstrong
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Jeffrey L. Shields
Zachary T. Shields
Callister, Nebeker & McCullough
10 East South Temple, #900
Salt Lake City, UT 84133

Julie A. Bryan
Cohne, Rappaport & Segal
525 East 100 South, Suite 500
Salt Lake City, UT 84102

BY THE COURT

/s/ [Illegible]
Deputy Clerk

APPENDIX 5

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN RE:	)	
MOUNTAIN PACIFIC VENTURES, INC.	)	Case No. 99-22588 Chapter 11
Debtor,.	)	
DONALD E. ARMSTRONG	)	Adv. No. 01-2383
Plaintiff,	)	
vs.	)	
ROGER G. SEGAL, et al.	)	
Defendants.	)	

ORDER

On the 20th day of March, 2003, the Amended Motion to Dismiss filed by Roger Segal, Julie Bryan and Cohne, Rappaport & Segal, Joinder in Motion to Dismiss filed by MG Properties and Mark Gleiberman, Joinder by James Marinos, Joinder by Thomas L. and Wilma J. Black, Thomas D. Paxton, M. E. Porcupile, Bert Yager, Mario Cioe and Rose Cioe, Carolee Gillam and Descanso Associates; Objection filed by Donald E. Armstrong; Reply by Roger Segal, Julia A. Bryan and Cohne, Rappaport & Segal; and Reply filed by MG Properties and Mark Gleiberman came on for hearing. Counsel appearing were Julie A. Bryan and Roger Segal for Roger Segal, Julie A. Bryan and Cohne, Rappaport & Segal; Gerald Suniville for MG Properties and Mark Gleiberman; and Donald E. Armstrong, pro se. After hearing arguments presented,

this Court does hereby enter the following findings and conclusions in conformity with Rule 7052, Fed. R. Bankr. P.

The parties seek dismissal of this adversary proceeding for failure to state a claim. The Plaintiff filed an Amended Complaint (1) for a declaratory ruling regarding a commission on the sale of the Descanso property; (2) that Roger Segal, Julie Bryan and Cohne, Rappaport & Segal breached their fiduciary duty to Mountain Pacific Ventures and its creditors; (3) for conspiracy and (4) for fraud and conspiracy regarding a post-petition commission on the sale of the Broadway Apartments. After this adversary proceeding was commenced, the Defendants filed a Motion to Dismiss and/or Joinders in the Motion to Dismiss. Armstrong filed an Application to Withdraw the Reference. The District Court denied the Motion to Withdraw the Reference on December 18, 2002.

First, Armstrong seeks to require Descanso to pay the estate of Mountain Pacific Ventures funds owed to it. Further, Armstrong alleges that Descanso owes a commission. Dismissal for lack of standing falls within Fed. R. Civ. P. 12(b)(6). *In re Stoll*, 252 B.R. 492 (9th Cir. BAP 2000) (citations omitted). "To have standing, a party must assert its own legal rights and interests and cannot rest its claim to relief on the legal rights or interests of third parties." *In re Cogar*, 210 B.R. 803, 808 n. 7 (9th Cir. BAP 1997). The *Stoll* Court noted:

> While a *third* party hired by a bankruptcy trustee may owe a fiduciary duty to the estate, *see, e.g., In re Taxman Clothing Co.*, 49 F.3d 310, 314 (7th Cir. 1995), it does not necessarily follow that the Debtor and individual creditors have standing to pursue redress for a violation of that duty.

> A trustee is the legal representative of the bankruptcy estate and as such has the capacity to sue and be sued. § 323. *See also In re Joseph*, 208 B.R 55, 60 (9th Cir. BAP 1997). Only a trustee may pursue a cause of action belonging to the bankruptcy estate. *Griffin v. Allstate Ins. Co.*, 920 F. Supp. 127, 130 (C.D. Cal. 1996); *Bostanian v. Liberty Savings Bank*, 52 Cal.App.4th 1075, 61 Cal. Rptr.2d 68, 72 (1997).

Stoll, 252 B.R. at 495.

Whether a claim is property of the estate or belongs to an individual creditor depends on whether the claim is a general or particular claim. *In re Morpheus Lights, Inc.*, 228 B.R. 449, 453 (Bankr. N.D. Cal. 1998). "If a claim is a general one, with no particularized injury arising from it, and the claim can be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." *St. Paul Fire & Marine Insurance Co. v. PepsiCo, Inc.*, 884 F.2d 688, 700-01 (2nd Cir. 1989) (citations omitted).

In this case, Armstrong is a creditor of Mountain Pacific Ventures. The action is a general claim that belongs to the Trustee. If there is some compromise between the Trustee and Descanso, an appropriate Motion to Compromise will be required and Armstrong will be given the opportunity to object. However, in this case, the Mountain Pacific Ventures' Plan has been substantially consummated and the right to payment from Descanso has passed to Kenneth A. Rushton, Chapter 11 Trustee of the Estate of Donald E. Armstrong. Donald E. Armstrong was the sole shareholder of Mountain Pacific Ventures when

Donald E. Armstrong filed an individual Chapter 11 in March, 2000.

Armstrong's claim against Descanso for a commission bears no relation to this bankruptcy. If Armstrong is entitled to post-petition commission pursuant to some agreement, this is not the appropriate forum to bring such action.

Next, Armstrong seeks to bring an action for breach of fiduciary duty against Roger Segal, Julie Bryan and Cohne, Rappaport & Segal Armstrong brought this adversary proceeding during the pendency of the bankruptcy. Section 362(a)(3) provides that the filing of a petition operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. §362(a)(3). Since the filing of this adversary proceeding, the Mountain Pacific Ventures' Plan was confirmed. The confirmation order in that case contained a litigation injunction which provides:

> B. *Litigation Injunction.* Armstrong, the Donald E. Armstrong Family Trust, the Donald E. Armstrong Charitable Remainder Unitrust, and any other entity related to Armstrong and controlled by him in whole or in part, now or in the future, and any other entity over which Armstrong asserts actual control in whole or in part, now and in the future, their agents, attorneys and those acting in concert with them, are hereby permanently enjoined from commencing or continuing any litigation against Steepes [sic] Apartments, Ltd. ("Steppes"), John Feece, Rosalie Feece, Baxter Holdings, Inc., Jeffrey L. Shields, Zachary T. Shields, Callister Nebeker & McCullough, Robert Bodoin, Hill Gilstrap, Frank

Hill, Frank Gilstrap, Sal Espino, Chris Harris, Ben Levinson, Victor Vilaplana, Dennis Wickham, Elizabeth Smith, and Seltzer Caplin McMahon Vitek, and any and all other attorneys of Steppes and their law firms and all employees of such firms, Roger G. Segal as trustee in *In re Mountain Pacific Ventures, Inc.*, Bankr. Case No. 99-22588, Kenneth A. Rushton, ("Rushton") Trustee in *In re Donald E. Armstrong,* Bankr. Case No. 00-26592, and those parties' principals, professionals, agents, and assigns based upon (1) claims or causes of action released pursuant to the terms of the Plan and the Settlement Agreement, and (2) claims or causes of action based upon action taken by the Trustees, the Steppes Parties (all as defined in the Settlement Agreement) and any of those parties' principals, professionals, agents, and assigns in effectuating the Settlement Agreement and the Plan. *See also* Fed. R. Bankr. P. 3016(c)(2002).

Armstrong must apply to this Court for authority to commence litigation against any of these parties or their principals, professionals, agents, or assigns, must show the proposed litigation does not violate the terms of this Plan, and must provide reasonable notice and opportunity to respond to the party against whom Armstrong wishes to proceed. The Court will grant such authority only upon a finding that such litigation does not violate the terms of this Plan, and this Litigation Injunction. If Armstrong applies to the Court to pursue such litigation and his application is denied, then the party or parties responding to the application shall be awarded reimbursement of attorneys' fees and costs reasonably incurred in connection with the application, which the Court, in its discretion,

> may assess against Armstrong and/or which may be paid from funds remaining in the estate or from the Armstrong Estate under Paragraph 1.9 of the Settlement Agreement.

Armstrong did not obtain relief from the automatic stay nor has he obtained Court approval after the litigation injunction was entered.

Further, the Amended Complaint fails to state a claim for breach of fiduciary duty. An allegation that a trustee has shown poor judgment does not provide a basis for breach of fiduciary duty. *In re Kidscreek Partners, L.P.*, 248 B.R. 554, 561 (Bankr. N.D. Ill. 2000).

The Amended Complaint also fails to state a claim for conspiracy. A civil claim for conspiracy requires: (1) a combination of two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result thereof. *Tremelling v. Ogio International, Inc.*, 919 F.Supp. 392, 395-96 (D. Utah 1996) (citing *Israel Pagan Estate v. Cannon*, 746 P.2d 785 (Utah Ct. App. 1987). The *Israel Pagan Estate court* noted:

> To assert civil conspiracy, plaintiff must also prove that the alleged conspirators performed one or more unlawful, overt acts. If the object of the alleged conspiracy or the means used to attain it is lawful, even if damage results to plaintiff or defendant acted with a malicious motive, there can be no civil action for conspiracy. 'If such were not the rule, obviously many purely business dealings would give rise to an action in tort on behalf of one who may have been adversely affected.' *Duffy*, 541 P.2d at 1202

Israel Pagan Estate, 746 P.2d at 792. This dispute centers around business judgment. The "object" of this alleged conspiracy is lawful and there can be no civil action for conspiracy. Thus, the claim must fail.

Lastly, the issue regarding the Broadway Apartments commission has been resolved in the case of *Donald E. Armstrong*, Bankr. Case No. 00-26592. In the Donald E. Armstrong case, on May 15, 2001, an order was entered approving the sale of an apartment complex located in Escondido, California. This adversary is merely a collateral attack on that order. Armstrong appeared at the hearing on that motion. As a result, the Court finds that this cause of action must fail.

IT IS THEREFORE ORDERED that the Amended Motion to Dismiss filed by Roger Segal, Julie Bryan and Cohne, Rappaport & Segal and Joinder in Motion to Dismiss filed by MG Properties and Mark Gleiberman, Joinder by James Marinos, Joinder by Thomas L. and Wilma J. Black; Thomas D. Paxton, M. E. Porcupile, Bert Yager, Mario Cioe and Rose Cioe, Carolee Gillam and Descanso Associates is **granted**.

DATED this 9th day of April, 2003.

/s/ Tom Cornish
TOM R. CORNISH
United States
Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Order, postage prepaid, this 11th day of April, 2003, to the following:

Donald E. Armstrong
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Van Cott Bagley Cornwall & McCarthy
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James S. Marinos
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Leslie W. Slaugh
HOWARD, LEWIS & PETERSON
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Provo, UT 84603

EOD: 4/11/03

(3)

Supreme Court, U.S
FILED
DEC 3 - 2004
OFFICE OF THE CLERK

No. 04-479

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD E. ARMSTRONG, POST-BANKRUPTCY PETITION AND AS A BENEFICIARY OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST,
Petitioner

v.

ROGER G. SEGAL, AS TRUSTEE OF THE MOUNTAIN PACIFIC VENTURES, INC. et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPPORT OF PETITION FOR A WRIT OF CERTIORARI

DONALD E. ARMSTRONG, PRO SE
INDIVIDUALLY, POST-BANKRUPTCY PETITION AND AS BENEFICIARY OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST
P.O. Box 1059
Park City, Utah 84060-1059
(435) 649-6477

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald E. Armstrong, individually and post-bankruptcy-petition and as a beneficiary of the Donald E. Armstrong Family Trust ("Family Trust") and the Donald E. Armstrong Charitable Remainder Unitrust ("Charitable Trust") (collectively the "Trusts") ("Armstrong") respectfully submits this Reply Brief in Support of Petition for a Writ of Certiorari to review one decision of the Tenth Circuit Court of Appeals.

PETITION QUESTIONS PRESENTED

1. Can a permanent injunction be moot preventing appellate review and be an unconstitutional denial of a party's access to the courts?

2. Can a bankruptcy court enjoin non-parties to a settlement—especially that have not been noticed of the bankruptcy proceedings and where the estate was fully liquidated?

3. Are interlocutory orders in dismissed cases based on F.R.C.P. 41(a) entitled to preclusive effect?

4. Can penalties of over $2.8M in relation to zero actual damages against non-debtors provide standing to an alleged creditor and are these penalties unconstitutionally excessive? Can any exemplary damages be awarded without an award of actual damages?

5. Can a bankruptcy plan of reorganization be approved based on paying all unsecured creditors when one unsecured creditor has not been paid

and that creditor was denied the right to a hearing?

PARTIES TO THE PROCEEDINGS

Roger G. Segal as Trustee of the Chapter 11 Bankruptcy Estate of Mountain Pacific Ventures, Inc.

Kenneth A. Rushton as Trustee of the Chapter 11 Bankruptcy Estate of Donald E. Armstrong

Steppes Apartments, Ltd.

John L. and Rosalie Feece

Donald E. Armstrong as Trustee of the Donald E. Armstrong Family Trust and Donald E. Armstrong Charitable Remainder Unitrust

Donald E. Armstrong, Post Bankruptcy Petition And As Beneficiary of the Donald E. Armstrong Family Trust and the Donald E. Armstrong Charitable Remainder Unitrust

TABLE OF CONTENTS

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI i

PETITION QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR GRANTING THE PETITION 2

1. THE LITIGATION INJUNCTION 5

2. THE TEXAS MODIFIED JUDGMENT 8

3. THE SUZUKI 9

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

BMW of North America, Inc. v. Gore, 517 U.S. 559, 568, (1996) 10

In re Pritam Realty, Inc., 233 B.R. 619 (D. P.R. 1999) .. 3

In re Public Service Co. of New Hampshire, 963 F.2d 469, 471 (1st Cir. 1992) 3

In re Western Real Estate Fund Inc., 922 F.2d 592, 601 (10th Cir. 1990) 4, 5, 7

In re Zale Corp., 62 F.3d 746 (5th Cir. 1995) 6

SEC v. Drexel Burnham Lambert Group, 960 F.2d 285 (5th Cir. 1992) 6

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S.Ct. 1513, (U.S.,2003) 10

STATUTES

11 U.S.C. § 524 6

11 U.S.C. § 524(e) 4, 5, 9

11 U.S.C. § 726(a)(4) 4

11 U.S.C. § 1129 9

STATEMENT

First, Roger G. Segal ("Segal") confuses the issues and raises new issues rather than addressing Armstrong's issues. It is impossible for Armstrong to fully respond to all of Segal's allegations in ten pages.

As usual Segal principally attacks Armstrong personally and distorts the facts to avoid the issues. The first major discrepancy is that Segal asserts that Steppes Apartments, Ltd. ("Steppes") Texas Modified Judgment ("Judgment") was against Armstrong. The Judgment was against two trusts where Armstrong was the trustee and specifically excluded liability against Armstrong individually. (Petition at 29a--32a.)

There are numerous other blatant misrepresentations in Segal's opposition. Segal claims that the settlement with Steppes would have paid unsecured creditors in the Armstrong bankruptcy estate. There were no funds to pay unsecured creditors once the plan of reorganization was approved in the Armstrong estate. All of the assets of the Armstrong estate were used to pay attorneys. The ONLY reason for the plans of reorganization in both the MPV and the Armstrong bankruptcies was to obtain the Litigation Injunction ("Injunction"). (Opposition 32a—33a) It is simply a lie that any funds could have been paid to unsecured creditors in the Armstrong estate.

Segal acknowledges that the court found that Steppes' lis pendens were wrongful liens. Steppes continued these wrongful liens after the bankruptcies were filed and affected Armstrong post-bankruptcy petition. Armstrong's post-bankruptcy petition claims were not part of either estate and Armstrong has been denied the right to pursue Armstrong's post-bankruptcy petition claims through the Injunction. (*Opposition* at 2)

Segal outlines the Injunction and how it releases and protects non-debtors and enjoins numerous parties.

Most of these parties, including the Trusts, were never noticed and received no due process. (*Opposition* at 4) The Injunction is included in the Steppes' settlement where Armstrong, the Trusts and others were not parties. A settlement is a contract and cannot affect non-parties to the contract. **A bankruptcy plan of reorganization cannot create rights against non-parties especially without due process.**

Segal admits Steppes received no distribution from MPV. Segal fails to mention that Steppes had no right to a distribution since Steppes' alleged claim was disallowed in the September 7, 2001 Order subject to Steppes filing an amended claim that Steppes never filed. (*Petition* p. 41a) Despite Steppes having no claim in MPV, the essence of the MPV plan was to protect the Steppes' Parties. (*Opposition* at 4) Steppes was not the debtor or a claimant and yet received releases and protections in contradiction to Section 524(e).

Armstrong filed a proof of claim relating to the 1993 Suzuki ("Suzuki"). Segal filed an objection but a hearing was never held.

REASONS FOR GRANTING THE PETITION

Segal did not respond to Armstrong's Issues 2 and 3 illustrating that Segal has no objection to this Court granting Armstrong's Petition as to Issues 2 and 3 at the very least.

Permanent Injunctions can be vacated when the facts and circumstances change such as the MPV bankruptcy estate closing. Segal does not address the principal issue that a continuing and permanent injunction can never be moot. As long as the Injunction remains pending and effective it continues to affect Armstrong forever. If the MPV plan is moot there can be no permanent injunction and conversely if the Injunction remains effective the plan is not moot. This is simple. Segal claims that "virtually" every task is

complete. (*Opposition at* 15) If the MPV estate is "complete" there is no purpose for the Injunction. Once the MPV estate closes, there is no purpose for the Injunction EXCEPT to protect Steppes for post-bankruptcy petition issues that have no bearing on MPV.

Segal cites *In re Pritam Realty, Inc.*, 233 B.R. 619 (D. P.R. 1999). *Pritam* relates to a sale of property and not an injunction. Mootness in bankruptcy proceedings "is premised on jurisdictional and equitable considerations stemming from the impracticability of fashioning fair and effective judicial relief". *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 471 (1st Cir. 1992) Clearly, it is inequitable and unfair to allow the permanent Injunction to remain in effect; and clearly, fair and effective judicial relief can be fashioned in eliminating the permanent injunction especially since it has absolutely no effect on the MPV estate.

Segal argues that the MPV estate could not be resolved because of the claims filed by Armstrong. This Court requires additional facts on this issue. Armstrong's claims were for the alleged $400,000.00 partnership interest that Armstrong transferred to MPV canceling the impact of this $400,000.00. The other claims were for the Suzuki and an Armstrong loan of approximately $60K to MPV. Rushton settled these claims proving they were no hindrance.

Contrary to Segal's assertions, all claims have not been paid in full as Segal did not pay Armstrong's unsecured claim for the Suzuki. There are two portions to the Suzuki claim—the secured portion and the unsecured portion. Whatever the value of the Suzuki at the time of confirmation can be subtracted from the claim of $7,315.90 plus interest leaving the unsecured claim for the balance that was never paid. It is true that Armstrong's retaining the Suzuki does resolve Armstrong's secured claim *but* does not resolve the

unsecured claim. Rushton stipulated on June 23, 2003 that the unsecured portion of the same Suzuki claim was $6,390.75. The unsecured claim was never paid or even addressed in the MPV case. To determine the unsecured claim only required a valuation of the Suzuki rather than surrender. In fact, surrendering the Suzuki would accomplish nothing in relation to valuing the vehicle. Armstrong had no funds to purchase a vehicle and surrendering the Suzuki eliminated Armstrong's only transportation. Segal's clear purpose was exactly that—to eliminate Armstrong's only transportation since there was no other purpose for surrendering the Suzuki.

What is the purpose of the Steppes' Settlement? Since Steppes no longer had any claim in MPV, how did Steppes even have standing? Segal and Rushton created Steppes' standing and granted Steppes releases and injunctions when Steppes could no longer affect the MPV estate. That is not the purpose of the Bankruptcy Code and it is important to all debtors and creditors for this Court to prevent the use of the bankruptcy courts to protect certain alleged creditors at the expense of debtors and other legitimate creditors. There is certainly no provision for this in the Bankruptcy Code. 11 U.S.C. § 524(e) *In re Western Real Estate Fund Inc.*, 922 F.2d 592, 601 (10th Cir. 1990) ("*Western*") There is a split among the circuits on this specific point as to whether Section 105(a) overcomes Section 524(e) that requires this Court's attention.

Segal argues that the unsecured creditors were paid in full as if that is some great accomplishment on Segal's part. Steppes' alleged claim was solely for Texas statutory penalties. All that Segal had to do was to convert the MPV case to Chapter 7 where penalties can be subordinated to other unsecured claims. 11 U.S.C. § 726(a)(4) Instead, Segal perpetuated the MPV estate solely to obtain the Injunction to protect Steppes thereby

holding the legitimate unsecured creditors funds for years. The unsecured creditors could, and should, have been paid in 2000 rather than 2002. Segal could easily have converted the case to Chapter 7, paid all unsecured creditors and returned a significant dividend to Armstrong. Instead, Segal continued the case while holding funds sufficient to pay the unsecured creditors generating hundreds of thousands in legal fees.

SEGAL WON AGAINST STEPPES AND YET STILL CREATED THE PLAN WITH THE PRIMARY PURPOSE OF PROTECTING STEPPES. THIS IS NOT THE PURPOSE OF THE BANKRUTPCY CODE AND IT IS IMPORTANT FOR THIS COURT TO STATE WHAT BANKRUPTCY COURTS CAN AND CAN'T DO IN THIS REGARD. (*Opposition* at 1--2)

1. THE LITIGATION INJUNCTION

Segal does not address the primary issue that the Bankruptcy Code does not support or authorize the Injunction. 11 U.S.C. § 524(e) *In re Western* Segal does not provide any legal authority that the bankruptcy court could release anyone but the debtor or enjoin non-parties. It is up to this Court to address this question—whether bankruptcy courts can protect non-debtors and/or non-parties. Why would Segal spend hundreds of thousands of dollars merely to protect Steppes when there is no benefit to the estate?

It is imperative that this Court write an opinion addressing who can be protected in bankruptcy court.

Segal first argues that vacating the Injunction would have no effect since the Injunction remains in the Armstrong Plan. That argument is a red herring and bears no consideration. If the Injunction is void it is void everywhere. Regardless of Rushton and Steppes desiring the Injunction, if there is no authority for the Injunction the courts cannot enter or enforce the Injunction. Steppes, Rushton and Segal can agree not to pursue each

other but they cannot mutually agree that some third party cannot pursue them especially for matters that do not relate to the bankruptcy estates. This is ludicrous and requires this Court's attention. The essence of this argument is that bankruptcy trustees can enter into any type of agreement they wish affecting anyone they want—without notice, due process, hearings or statutory authority.

Clearly, non-parties to a contract cannot be affected by a contract. Bankruptcy courts cannot alter this basic law through plans of reorganization. This Court must address this issue and provide guidance to the courts.

In fact, Congress addressed this issue in 11 U.S.C. § 524. Section 524(e) limits bankruptcy courts' ability to release anyone except debtors. Congress amended Section 524 in 1994 adding subsections g and h to address asbestos bankruptcies. Subsections g and h are very detailed and specific. Even assuming the instant Injunction related to asbestos claims, the Injunction would not stand since it does not comply with subsections g and h.

There is no continuing purpose for the Injunction. In fact, the Injunction requires the MPV and Armstrong bankruptcy estates to remain in existence forever.

Segal relies on *SEC v. Drexel Burnham Lambert Group*, 960 F.2d 285 (5th Cir. 1992) ("Drexel"). The same 5th circuit examined Drexel in 1995. *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995) ("In those cases, however, the courts upheld permanent injunctions of third-party claims because while the injunction permanently enjoined the lawsuits, it also channeled those claims to allow recovery from separate assets and thereby avoided discharging the nondebtor.") This case can be distinguished from the MPV case. The MPV Injunction releases non-debtors, non-parties and non-

creditors with no benefit to the estate. Furthermore, the Tenth Circuit is clear that 11 U.S.C. § 105(a) does not provide authority to release non-debtors. *In re Western*

Segal argues that all these claims belong to MPV and Rushton. This is not about the estates' claims-it is about Armstrong's post-bankruptcy petition claims that have absolutely nothing to do with MPV or the Armstrong estate. Segal et al. complain about the estates' claims, but the truth is that they have denied Armstrong the right to Armstrong's own personal post bankruptcy petition claims. Steppes continues to threaten to sue Armstrong personally to collect the Judgment post-bankruptcy petition relying on the Injunction to prevent Armstrong from defending himself.

Segal argues that no stranger is released under the Plan. Steppes had no claim in MPV. Clearly all the Steppes' Parties are strangers to MPV and yet are protected by the Injunction. (*Opposition* at 32a)

Segal blatantly misrepresents the facts to this Court in footnote 4 in arguing that Steppes is enjoined from pursuing Armstrong because of Armstrong's discharge. The Steppes' Settlement specifically purports to allow Steppes to refile Steppes' nondischargeability complaint. (*See Petition* p. 66a)

Segal claims Armstrong has not articulated Armstrong's own claims. Armstrong is entitled to pursue Armstrong's own post-bankruptcy petition claims against Steppes and others that have nothing to do with MPV or the Armstrong estate. Steppes still claims to have post-bankruptcy petition claims against Armstrong and Steppes continued to affect Armstrong post-bankruptcy petition with the wrongful liens. These post-bankruptcy petition claims are Armstrong's personal property. At the very least, this Court is entitled to have all the facts relating to the new issues Segal presents.

The Injunction protects Steppes and others for all claims. If the MPV and Armstrong estates' are closed, Armstrong is procedurally prevented from any possibility of obtaining permission to pursue claims as no legal avenue will exist in order for Armstrong to obtain permission from the court, as outlined in the Injunction. Therefore, Armstrong is completely denied any opportunity to be heard.

An order that protects Steppes and others AND that has no relationship to MPV is not authorized by the Bankruptcy Code. It is critical that this Court resolve these questions about the extent of bankruptcy court jurisdiction and authority.

2. THE TEXAS MODIFIED JUDGMENT

All of Steppes' claims are based on the Judgment. Additionally, all this litigation stems from Steppes' efforts to reverse or ignore the provisions in the Judgment that preclude liability against Armstrong. Armstrong was not a party to the Texas Litigation and was specifically excluded from liability. (*See Petition* pgs. 29a--32a) It is Segal, Steppes and Rushton that ignore preclusion principles in attempting to make Armstrong, MPV or the Armstrong estate liable. It is the Trusts that appealed the Judgment through the legal system and not Armstrong. Armstrong is entitled to his own due process in relation to these issues. It is time for this Court to grant Armstrong's petition and review these penalties. Several principle issues have never been addressed because Armstrong, individually, was not a party to the Texas Litigation or the Judgment and the Texas courts did not address these issues claiming they were waived by the Trusts.

These issues are important to all parties being burdened with unconstitutionally excessive penalties especially in relation to zero actual damages. The facts of this case present the perfect opportunity for this Court

to address over $2.8M in penalties in relation to zero actual damages in a judgment that specifically excludes liability against the party being burdened with the penalties.

3. THE SUZUKI

The Bankruptcy Code provides means for approving a plan of reorganization. 11 U.S.C. § 1129 Segal allegedly relied on these provisions. However in Segal's efforts to ignore the law and punish Armstrong, Segal refused to pay Armstrong's unsecured claim of $6,390.75 and risk the MPV Plan. Segal knew this was not the law AND Segal knew the courts would do anything to punish Armstrong.

The truth is simple—Segal did not pay this one unsecured claim and therefore violated the Bankruptcy Code. The question for this Court is whether to allow courts to ignore the Bankruptcy Code to achieve whatever result the court wishes. This is a broad and powerful question this Court should address.

CONCLUSION

Underlying all the issues here is that parties representing themselves are continually denied notice, due process and the law. These facts present a perfect opportunity for this Court to confirm that pro se parties are entitled to the protections of the constitution and the law. To deny the petition is to confirm that parties representing themselves have no rights in our courts.

No permanent injunction is moot and Armstrong is entitled to review. The bankruptcy Court cannot enjoin non-debtors and non-parties especially relating to claims that have no relationship to the bankruptcy estate. Bankruptcy courts have no authority under 11 U.S.C. § 105(a) to release non-debtors and/or enjoin non-debtors. This is an open question requiring this Court's attention. At the very least, the Injunction must be modified so that it only protects MPV as the debtor. 11 U.S.C. § 524(e)

This Court should grant review to address the interplay between Sections 105(a) and 524(e) as to who bankruptcy courts can release, protect and/or enjoin.

Segal relies on interlocutory orders in cases that were dismissed for preclusive effect. Interlocutory orders, especially in cases that are voluntarily dismissed under F.R.C.P. 41(a), are not entitled to preclusive effect. This Court must address and confirm this issue to prevent further confusion such as in this case.

The MPV Plan's principal purpose is to protect Steppes from review of the $2.8M in penalties in the Judgment. Armstrong continues to be entitled to review of the Judgment penalties as long as the Injunction protects Steppes from such review. It is critical that this Court apply *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 568, (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell,* 123 S.Ct. 1513, (U.S.,2003) tests to statutory penalties and address any penalties being awarded when zero actual damages are awarded.

Segal did not pay Armstrong's unsecured claim based on the Suzuki thereby raising the critical question of whether plans of reorganization can be approved without fully complying with the Bankruptcy Code. It is critical this Court address this question for all the bankruptcy cases in this country.

These questions are important since they have the potential to affect the thousands of bankruptcies filed every year.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.
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